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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 408

H. C. ORTON, D. C. WOLF, J. B. JOHNSTON, KARL A. MEYER, and RUCKER PENN, as a Protective Committee for the Holders of Preferred Stock of CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, Debtor,

Petitioners,

vs.

GROUP OF INSTITUTIONAL INVESTORS, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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No. .....

H. C. ORTON, D. C. WOLF, J. B. JOHNSTON, KARL A. MEYER, and RUCKER PENN, as a Protective Committee for the Holders of Preferred Stock of CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, Debtor,

Petitioners,

vs.

GROUP OF INSTITUTIONAL INVESTORS, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners, H. C. Orton, D. C. Wolf, J. B. Johnston, Karl A. Meyer, and Rucker Penn, as a Protective Committee for the Holders of Preferred Stock of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, pray the issuance of a writ of certiorari to review

the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered May 17, 1946. This judgment dismissed their appeal from an order entered January 3, 1946, by the District Court of the United States for the Northern District of Illinois, Eastern Division, denying petitioners' motion to modify (by retaining jurisdiction over the Debtor's property until the termination of the Seventy-Ninth Congress) the order transferring the Debtor's property to the reorganized company.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The District Court order appealed from.

The petitioners sought in the Circuit Court of Appeals for the Seventh Circuit review of an order of the District Court entered January 3, 1946 (R. 98), in the proceedings for the reorganization of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. The order denied a motion of petitioners, acting as the preferred stockholders committee, to modify an order of the District Court entered November 26, 1945. The November 26, 1945, order provided that the property of the Debtor be turned over to the reorganized company (R. 7). The motion to modify (R. 55) was made December 24, 1945, within the time for an appeal from the order sought to be modified.

The motion was not for a reconsideration of the order aforementioned but sought, because of the introduction in Congress of a bill to relieve railroad stockholders from the loss of their equity, to have the court retain jurisdiction *during the existence of the present Congress* for the purpose of applying such legislation (when passed) to the property of the Debtor and the parties to these pro-

ceedings. The legislation referred to, known as the Reed Bill (H. R. 4779, R. 59), was introduced on November 23, 1945, three days before the entry of the order sought to be modified. The introduction of this legislation was unknown to the preferred stockholders' committee and to the court on November 26, 1945, when the order transferring the property came on for hearing. The motion, therefore, presented new matter not previously called to the attention of the court and on which the court was, as a consequence, passing for the first time. The committee alleged that it believed that the legislation had a reasonable chance of promptly becoming law.

Remedial legislation as hereinafter described, combining the Reed Bill and other provisions, was in fact passed by the Seventy-Ninth Congress but allowed to die by the President on August 13, 1946, by his failure to sign it within the time allowed by law. On that date he issued a statement which clearly indicated sympathy with the purpose of the legislation. The reasons given therein for his not signing were that the bill failed to go far enough in providing certain corrective measures and therefore would not sufficiently remedy the "deficiencies and inequities and evils that exist under Section 77." The Seventy-Ninth Congress will not terminate until the Eightieth Congress convenes on January 3, 1947, and although it has adjourned there is nothing to prevent a special session thereof at which time a new bill meeting the Presidential criticism might be enacted into law. Until January 3, 1947, therefore, the possibility of remedial legislation still exists.

The plan of reorganization.

Petitioners' motion did not seek to have the court change or set aside the plan of reorganization of the Debtor. Therefore, the details of the plan, the history of the

Debtor, and description of the properties, are omitted from this statement.

These facts with respect thereto are, however, necessary for a consideration of this case:

The plan as originally reported by the Interstate Commerce Commission on February 12, 1940 (239 I.C.C. 485), provided for a maximum capitalization of the Debtor as reorganized of $548,533,321. The plan as modified in matters not here important, reported by the Interstate Commerce Commission April 10, 1944 (254 I.C.C. 707; 257 I.C.C. 223), provided for the issuance of securities in the face amount of $533,090,698. The plan as modified was confirmed by the District Court February 23, 1945 (R. 1).

The plan gave no recognition to the $119,307,300 par amount of preferred stock of the Debtor.

The debt plus interest of the Debtor, as adjusted by the amount provided to be paid in cash under the modified plan, was $618,220,988. Thus $85,130,290 of creditor's claims were unsatisfied under the plan.

In the six years, 1940 to 1945, inclusive, since the plan was approved by the Interstate Commerce Commission, as disclosed by the annual reports of the railroad filed with the Commission, the net earnings of the Debtor after allowance of the full interest (both fixed and contingent) on the Debtor's old capitalization, aggregated approximately $55,650,000. This sum, added to surplus, plus the $15,442,623 of permissible capitalization fixed by the original report of the Interstate Commerce Commission and not provided to be used under the plan as modified, leaves an unsatisfied debt of less than $15,000,000.

During the 1940 through 1945 period, annual charges for maintenance of way and equipment averaged over $61,-

700,000 against a yearly average during the preceding six years of less than $40,000,000.

Thus the property, apparently excellently maintained, has earned an average of more than $9,000,000 per year after charges on its old debt subsequent to the time when the Interstate Commerce Commission fixed the permissible capitalization wiping out the interest of the preferred stockholders. The eliminated preferred stock earned 7½ per cent during this period.

At the time of the transfer of the property to the Debtor as reorganized, only $7,189,000 of old debt and $47,614,000 of interest on the old debt were in default. Against this there was available cash, or its equivalent, of more than $97,000,00. Current assets were more than three times current liabilities.

Petitioners' motion and the hearing thereon.

Petitioners' motion to modify the order of November 26, 1945, by providing that the court retain jurisdiction over the property and the parties during the life of the present Congress, set forth the basis of the Interstate Commerce Commission's original report (financial statements through 1937 and earnings prior to 1940) and the Debtor's improved condition both as to earnings and working capital since that time (R. 56-57). The striking changes in the economic conditions of the country with a general increase in property values of not less than 30 per cent and an indicated increase in railroad values of approximately 97 per cent since the report of the Interstate Commerce Commission were pointed out.

Evidence disclosed that the property of the Debtor had been conveyed by the bankruptcy trustees to the Debtor as reorganized, its charter had been amended, and a large number of securities had been issued prior to

petitioners moving for amendment of the order. The distribution of securities had commenced about December 15, 1945, less than thirty days from the date of the order directing such securities to be issued. Also shown was the fact that stock issued in satisfaction of $100 debt per share had a market value at the time of issue of approximately $30 per share, and bonds issued on the basis of $100 face amount satisfying debt of $100 were selling substantially above par (R. 74, 78, 81-82, 86-88).

No stay in consumation of the plan was sought by petitioners.

The proceedings in the Circuit Court of Appeals.

The appeal was docketed in the Circuit Court of Appeals for the Seventh Circuit on February 1, 1946. Respondents moved to dismiss the appeal on February 6, 1946 (R. 99, 104). The court on February 23, 1946, deferred decision on the motion to dismiss until the hearing of the whole case, which was set for April 12, 1946 (R. 116). Printing of the record was dispensed with (R. 116). The opinion of the Circuit Court of Appeals and judgment in conformity therewith were entered May 17, 1946 (R. 117, 122). It is printed in full as Appendix A hereto. By subsequent orders, the mandate of the Circuit Court of Appeals was stayed to and including August 17, 1946, to permit the presentation of this petition for certiorari.

Legislative history of the Wheeler-Reed Bill.

H.R. 4779, the basis for petitioners' motion in the District Court, was introduced by Congressman Chauncey W. Reed of Illinois, on November 23, 1945. At that time there was pending in the Senate S. 1253, introduced by Senator Burton K. Wheeler of Montana, and hearings

thereon were being held before a subcommittee of the Senate Committee on Interstate Commerce. As originally introduced, S. 1253 was inapplicable to railroads in the process of reorganization.

H.R. 4779 later became known as H.R. 5924 and was favorably reported by the Committee on the Judiciary of the House of Representatives on March 28, 1946, together with a comprehensive report (Report No. 1838, filed April 2, 1946) indicating the crying need for remedial legislation in the railroad reorganization field.

S. 1253 was subsequently amended to cover railroads in reorganization proceedings under Section 77 of the Bankruptcy Act as amended. It was reported favorably by the Senate Interstate Commerce Committee accompanied by Report No. 1170, filed April 11, 1946. S. 1253 then passed the Senate, and the House, on July 24, 1946, struck out all after the enacting clause and inserted in lieu thereof the provisions of H.R. 5924 as amended. As thus amended, S. 1253 passed the House and, as a result, the Senate disagreeing to the amendments, the bill was sent to conference. A conference report was thereupon submitted and adopted by the House and Senate on July 31, 1946, after which S. 1253, as amended, was sent to the President for signature on August 1. On August 13, 1946, the President allowed the bill to die without his signature, issuing a statement indicating his agreement with the objectives of the bill but setting forth particulars in which the bill did not go far enough to accomplish its purpose. The text of the bill is printed in full in Appendix B and the text of the President's statement thereon is printed in Appendix C.

Section 2 (15) of S. 1253, known as the Wheeler-Reed Bill, would have been applicable to this case.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Seventh Circuit of May 17, 1946, is reported at 155 F. 2d 489.

The original report and order of the Interstate Commerce Commission dated February 12, 1940, is reported at 239 I.C.C. 485, and the supplemental reports and orders at 254 I.C.C. 707, and 257 I.C.C. 223. The original opinion of the District Court approving the plan is found at 36 F. Supp. 193, the Circuit Court of Appeals' opinion thereon at 124 F. 2d 754 and the opinion of this Court at 318 U.S. 523. The second order of the District Court approving the plan is found at 58 F. Supp. 385, the Circuit Court of Appeals' decision thereon at 145 F. 2d 299, certiorari denied at 324 U.S. 857, 325 U.S. 895.

JURISDICTIONAL STATEMENT

(a) The statutory provision believed to sustain the jurisdiction is found in Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. 347).

(b) The date of the judgment sought to be reviewed is May 17, 1946, and the date upon which this application for certiorari is presented is August 16, 1946.

STATUTES INVOLVED

Petitioners' right to appeal is based upon Section 77 (l) of the Bankruptcy Act, as amended (11 U.S.C. 205 (l), and Section 24 of the Bankruptcy Act, as amended (11 U.S.C. 47).

QUESTIONS PRESENTED

1. Is denial of a motion to modify an order, made upon newly discovered relevant matter and raising an entirely new question, appealable?

2. Does the court sitting in bankruptcy and as a court of equity have power to retain jurisdiction for a short time and a limited purpose over the property of a debtor when it authorizes the transfer of such property to a reorganized company?

3. Should the court, upon the basis of pending legislation, retain jurisdiction over the property of a debtor for a limited period of time in order to make such legislation applicable if it becomes law and the Congressional intent expressed in the legislation is that it should apply?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals for the Seventh Circuit has rendered a decision herein in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Trogler*, 237 Fed. 181.

2. The Circuit Court of Appeals for the Seventh Circuit has rendered a decision herein contrary to the principles announced and given effect to by this court in *Wisconsin* v. *Illinois*, 281 U.S. 179, where this Court recognized the possibility of Congressional action relevant to that controversy, although no legislation was then pending, and the decree contained a reservation of jurisdiction sufficient to cover such Congressional action (281 U.S. 696, 698).

3. The Circuit Court of Appeals for the Seventh Circuit has rendered a decision herein which departs from

the accepted and usual course of judicial proceedings in that it infringes upon the legislative branch of the Government by refusing to give any countenance to the intent of Congress.

4. The action of the District Judge, left undisturbed by the Circuit Court of Appeals for the Seventh Circuit's dismissal of the appeal herein, is directly inconsistent with and contrary to the action of the same District Judge only six months later in the reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company (see opinion of District Judge Michael L. Igoe, not yet reported, *In the Matter of The Chicago Rock Island and Pacific Railway Company, Debtor,* set forth in Appendix D hereto).

5. The action of the trial court and of the Circuit Court of Appeals sets a bad precedent since a frank admission that a party's rights are dependent upon Congressional action (then pending) is given no consideration and by inference the party is remitted to the position of having to obstruct and delay the decision of a case in order to preserve his rights until Congress acts.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

A statement of the case has been given in the petition (pp. 2-7), and, to avoid duplication, is not here repeated.

Specification of Errors

1. The Circuit Court of Appeals erred in dismissing the appeal.
2. The Circuit Court of Appeals erred in usurping the legislative function of Congress in setting the standards to be applied to railroad reorganizations and in prophesying what Congress would do (R. 120).
3. The Circuit Court of Appeals erred in finding no abuse of discretion by the trial court.
4. The Circuit Court of Appeals erred in speculating upon the likelihood of passage of the Reed Bill or any similar legislation and concluding that passage was unlikely, in view of the fact that retention of jurisdiction was requested for so short a period of time and so restricted a purpose, and no prejudice to any party was or could be shown by such a limited retention of jurisdiction. The possiblity of passage of the legislation was not in issue. After all, the bill did pass Congress, even though allowed to die without the President's signature, and may yet be enacted into law before the Eightieth Congress convenes.
5. The Circuit Court of Appeals erred in failing to reverse the order appealed from with directions to include the requested retention of jurisdiction in the order of November 26, 1945.

6. The opinion of the Circuit Court of Appeals contains several specific misstatements of fact, i.e.—

   (a) R. 118, the narrowing of the scope of the motion to retention of jurisdiction during the present Congress was done at the hearing on the motion itself in the trial court (R. 67) and not on oral argument in the Circuit Court of Appeals.

   (b) R. 120, the property was not turned over to the reorganized company on November 26, 1945, but the transfer order was entered at that time, to be effective after midnight November 30, 1945 (R. 19).

   (c) At the time of the hearing on the motion to modify, the plan had not been fully effected nor had dividends been paid. Issuance of the new securities began prior to the expiration of the 30-day period for appeal from the November 26 order (R. 88) and dividends were not declared or paid until after the appeal was docketed.

   (d) R. 121, the petitioners' motion was not one to vacate the "order of consummation" but to modify it in the light of facts which had not been and could not have been previously presented to the trial court (R. 55).

SUMMARY OF ARGUMENT

I.

Petitioners' appeal should not have been dismissed.

(a) No motion to vacate or rehear the District Court's order of November 26, 1945, was made or is involved. Petitioners sought modification of that order on the basis of newly introduced legislation by providing for the retention of jurisdiction over the Debtor's property during the life of the present Congress for the limited purpose of applying legislation passed by that Congress which might be otherwise applicable. Thus new matter, not a rehearing of an old controversy, was before the court. The ruling on the motion to modify based upon such new matter is appealable.

U.S. v. *Trogler,* 237 Fed. 181, 184-5.
U.S. v. *Rizzo,* 297 U.S. 530.

(b) The alleged lack of merit of the appeal was no ground for its dismissal. An appeal should only be dismissed if the order sought to be reviewed is not appealable or the appellate court lacks jurisdiction.

Amory v. *Amory,* 91 U.S. 356, 357.
Bohanan v. *Nebraska,* 118 U.S. 231, 233.
Sparrow v. *Strong,* 3 Wall. 97, 105.
Federal Land Bank v. *Hansen,* 113 F. 2d 82, 84-5.

II.

Petitioners were entitled to the relief sought in the District Court.

(a) The plan of reorganization of the Debtor was promulgated by the Interstate Commerce Commission early in 1940, based upon an analysis of conditions prior to that time. The Commission, despite its expertness, could not have been expected to foresee the changes of the past six years in our economy and in the world. Recognition of petitioners' rights is dependent upon estimates of value as distinguished from mathematical certainty. The difficulty of making exact appraisals has been well recognized.

Kuehner v. *Irving Trust Co.*, 299 U.S. 445, 454.

Consolidated Rock Products Co. v. *DuBois*, 312 U.S. 510, 526.

Group of Institutional Investors v. *Chicago, M., St. P. & P. R. Co.*, 318 U.S. 523, 542.

At the end of 1945, Congress was attacking the problem of revising railroad reorganization procedure to reflect these changed conditions. Action on this subject had undoubtedly been delayed by the preoccupation of the Congress and the country with the prosecution of the war. The courts should not stand in the way of legislative recognition of a radically changed economy.

Ecker v. *Western Pacific R. Corp.*, 318 U.S. 448, 468.

Group of Institutional Investors v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 539.

Helvering v. *Griffith*, 318 U.S. 371, 400-401.

(b) This Court has set a precedent for the retention of jurisdiction where the rights of parties depend upon Congressional action.

Wisconsin v. *Illinois*, 281 U.S. 179.

(c) Congress has indicated its intention by passing the Wheeler-Reed Bill, Sec. 2(15) of which is applicable to this case. Although the President refused to sign it, he stated his belief that a bill could be passed by Congress meeting his stated objections, which would be in the best interests of the public, the railroads, the bondholders and other creditors, *and* the stockholders. Hasty action of the trial court in transferring the Debtor's property without the requested retention of jurisdiction tended to usurp the power of Congress.

Wilson v. *New*, 243 U.S. 332.

U.S. v. *Jones*, 131 U.S. 1, 19.

Norman v. *B. & O. R. Co.*, 294 U.S. 240, 311.

U.S. v. *Crescent Amusement Co.*, 323 U.S. 173, 187.

(d) Legislation such as Sec. 2(15) of the Wheeler-Reed Bill is a valid exercise of Congressional power giving petitioners rights which should be recognized.

(1) Since no final decree had been entered in the trial court and no new rights had intervened, the court had jurisdiction over the parties and the property.

In re Chicago, Milwaukee, St. Paul and Pacific Railroad Co., Abrams, et al. v. *Scandrett, et al.*, 138 F. 2d 235.

Meyer v. *Kenmore Granville Hotel Co.*, 297 U.S. 160.

Simmons Co. v. *Grier Bros. Co.*, 258 U.S. 82.

In re Prima Co., 88 F. 2d 785, 788.

Baltimore & O. R. Co. v. *United States*, 279 U.S. 781, 786.

See also Robert T. Swaine in 56 Harvard Law Review 1193 at 1224.

(2) The bankruptcy and commerce powers of Congress permit the impairment of rights which may have vested.

Wright v. *Union Central Life Insurance Co.*, 304 U.S. 502, 517.

Continental Illinois Nat. Bank & Trust Co. v. *Chicago, R.I. & P.R. Co.*, 294 U.S. 648, 672.

Kuehner v. *Irving Trust Co.*, 299 U.S. 445, 450 (with respect to the bankruptcy power).

Louisville & N. R. Co. v. *Mottley*, 219 U.S. 467, 480 (with respect to the commerce power).

(3) No rights have vested in any party to this proceeding in a particular remedy or method of procedure which Congress cannot change.

Doty v. *Love*, 295 U.S. 64.

Chase Securities Corporation v. *Donaldson*, 325 U.S. 304, 316.

(4) New legislation applicable by its terms to the Debtor must be applied so long as the court has jurisdiction over the property and the parties.

Carpenter v. *Wabash Railway Co.*, 309 U.S. 23,

Ziffrin, Inc. v. *U.S.* 318 U.S. 73.

U.S. v. *Schooner Peggy*, 1 Cranch 103.

Dinsmore v. *Southern Express Co.*, 183 U.S. 115.

Massey v. *United States*, 291 U.S. 608.

(e) The trial court abused its discretion in denying petitioners' motion. Petitioners' rights were foreclosed unless the sought relief were granted. There was no allegation or proof that any party would have been harmed had the court retained jurisdiction. The result of the trial court's ruling, approved by the Circuit Court of Appeals, is two-fold:

(1) When an analogous situation was presented to the same trial court in The Chicago, Rock Island and

Pacific Railway Company reorganization six months later, the rights of junior creditors and stockholders were preserved, although the rights of petitioners had been ignored. Such inequality of treatment, based upon the fortuitous circumstance of a few months' difference in time of presentation, should not be countenanced.

American United Mut. Life Ins. Co. v. *Avon Park*, 311 U. S. 138, 145.

Securities and Exchange Commission v. *U. S. Realty & Improvement Co.*, 310 U.S. 434, 455.

United States Rubber Co. v. *American Oak Leather Co.*, 181 U.S. 434, 453.

International Bank v. *Sherman*, 101 U.S. 403, 406.

Brill v. *W. B. Foshay Co.*, 65 F. 2d 420, 424-425.

U.S. v. *Armstrong*, 26 F. 2d 227, 232.

(2) A bad precedent is set by the action of the lower courts where, as here, a party recognizes that his rights are dependent upon then pending Congressional action and frankly points this out to the court. He is given no consideration. By inference, the rulings below suggest that his only remedy is covert maneuvering for delay and obstruction of adjudication so that a final determination will not take place until Congress has acted. Such delay is obviously to be avoided.

Group of Institutional Investors v. *Chicago, M., St. P. & P. R. Co.*, 318 U.S. 523, 545.

ARGUMENT.

I.

PETITIONERS' APPEAL SHOULD NOT HAVE BEEN DISMISSED.

(a) A motion to modify an order, based upon new matter and presenting new issues to the court, is appealable.

Section 77 (l) of the Bankruptcy Act, as amended (11 USC 205 (l)), under which the proceedings in the trial court were pending, provides that the judicial powers of the court are the same as if the voluntary petition for adjudication had been filed and decree of adjudication entered on the date when petitioners' petition was filed. Thus the appeal section of the Bankruptcy Act, Section 24 thereof (11 USC 47), is applicable.

Since petitioners' motion to modify the order of November 26, 1945, was based upon the fact that three days prior to November 26 legislation vitally affecting the stockholders of the Debtor was introduced in Congress, which fact was unknown to the court and to the parties on that date, it presented new matter which was not and could not have been presented to the court on November 26. Thus no re-examination of the basis for the court's order of November 26, 1945, was presented. The motion to modify, filed on December 24, 1945, and heard on January 3, 1946, presented an entirely new issue, raising new questions which had not been previously decided.

In *U.S.* v. *Trogler,* 237 Fed. 181, 184-185, it was held that a motion to modify a decree was appealable as a

final determination of a new matter properly submitted to the court, emphasizing that the court below had not been asked to modify the former decree upon a re-examination of the real issues involved, but upon new circumstances arising after its entry, which justified the appeal. Such is exactly the case here.

Similarly, in *U.S.* v. *Rizzo*, 297 U.S. 530, a new and separate controversy was presented after decree. Action of the trial court on the motion to modify was held to be appealable.

Petitioners' rights with respect to the new legislation were finally determined by the entry of the trial court's order of January 3, 1946, and, therefore, that order is properly appealable as a matter of right.

The decisions cited by the Circuit Court of Appeals in support of its holding the order to be nonappealable (R. 121) are not in point. *In re Gelino*, 51 F. 2d 875, was an appeal from an order denying what was found to be a petition for rehearing. *Bass* v. *Baltimore & O. Terminal R. Co.*, 142 F. 2d 779, involved an order denying a motion for a new trial. *Old Colony Trust Co.* v. *Kurn*, 138 F. 2d 394, involved a motion to modify, so-called, but was in fact a decision on denial of a petition for rehearing, since the motion to modify did not present new facts and new issues, asking only for a higher interest rate on reorganization bonds than had previously been allowed. *Pfister* v. *Finance Corp.*, 317 U.S. 144, concerned denial of a petition for rehearing. *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U.S. 131, also involved a petition for rehearing and held that the order entered after the rehearing had been granted was appealable even though it might affirm the original order. *In re Witthoft*, 98 F. 2d 972, involved appeal from an order granting a continuance of the existing status for four and

one-half months, and in effect supports the relief requested by petitioners since the court there said (p. 973): "A temporary, limited continuance of the status with regard to title and possession of property to enable the court to study questions raised cannot be said to constitute an adjudication of those questions."

(b) An appeal should only be dismissed by the reviewing court if the order is not appealable or the appellate court lacks jurisdiction upon some technical ground.

Where, as here, an order is appealable as a matter of right, the appeal cannot be dismissed upon motion simply because the parties or even the court believe it has no merits. *Amory* v. *Amory,* 91 U.S. 356, 357; *Bohanan* v. *Nebraska,* 118 U.S. 231-233. Such motion to dismiss can only raise the regularity of the writ or appeal proceedings and the jurisdictional question of the appealability of the order. *Sparrow* v. *Strong,* 3 Wall 97, 105. The court cannot determine, nor should it be asked to, whether the appeal is insubstantial without an inquiry into the merits and opportunity to the appellants to present their case in full. When the order below is re-examined by the reviewing court even to the limited extent of determining whether or not the discretion of the trial court has been abused, the reviewing court exercises its appellate jurisdiction, and affirmance or reversal is required. *Federal Land Bank* v. *Hansen,* 113 F. 2d 82, 84-85.

II.

PETITIONERS WERE ENTITLED TO THE RELIEF SOUGHT IN THE DISTRICT COURT.

(a) Recognition of petitioners' rights with respect to any plan of reorganization is dependent upon estimates of value as distinguished from mathematical certainty. Congress has the right to set standards of value.

The plan of reorganization of the Debtor was promulgated by the Interstate Commerce Commission early in 1940, based upon an analysis of conditions prior to that time. In the years following, drastic changes took place in the national economy of the country which the Commission could not have been expected to foresee. The question of whether or not there might have been and still is actual value for the equity of the preferred stockholders is dependent upon an estimate and not upon a rigid formula. The difficulty of making exact appraisals of value has been well recognized by this Court. *Kuehner* v. *Irving Trust Company,* 299 U.S. 445; *Consolidated Rock Products Co.* v. *DuBois,* 312 U.S. 510, 526; *Group of Institutional Investors* v. *Chicago, M. St. P. & P. R. Co.,* 318 U.S. 523, 542.

The fact that conditions had so drastically changed was recognized by the Congress and at the end of 1945 it was attacking the problem of revising railroad reorganization procedure to reflect these changed conditions. Prior to that time, both Congress and the country at large had been preoccupied with the prosecution of the war, but with the end of hostilities the legislative body turned to an earnest consideration of the changes necessary in Section 77. The introduction of the Reed Bill on Novem-

ber 23, 1945, and the amendment of the Wheeler Bill early in 1946 to include railroads in reorganization, points to the clear Congressional intent to correct the well-recognized deficiencies. Where, as here, it appeared that Congress was acting, it was the duty of the trial court not to stand in the way of legislative recognition of this radically changed economy.

This Court when it first considered the plan of reorganization for the debtor herein in *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U.S. 523, 539, based its conclusions upon the mandate which Congress had given the Commission in Section 77. Certainly there was nothing to prevent the Congress from changing that mandate or to prevent change in the court's order thereby giving effect thereto. It is perfectly proper for Congress, after this Court has passed upon a certain problem, to enact a law directed thereto. *Helvering* v. *Griffith*, 318 U.S. 371, 400-401.

(b) This Court has set a precedent for the retention of jurisdiction where the rights of parties depend upon Congressional action.

In *Wisconsin* v. *Illinois*, 281 U.S. 179, 696-698, delay in adjudication of the case was sought because of possible Congressional action. There was, however, no pending legislation at the time the matter was presented to the court. It was said that the right of the complainants to a decree was not affected by the possibility that Congress might take some action in the matter but that all action of the parties and of the court would be subject to any order that Congress might make in pursuance of its constitutional powers and any modification that necessity might show should be made by the court. A decree was entered by this Court retaining jurisdiction for the pur-

pose of any order or direction or modification of the decree or any supplemental decree which it might deem at any time to be proper in relation to the subject matter in controversy. Petitioners' motion sought to obtain only a retention of jurisdiction such as this Court provided in the *Wisconsin* v. *Illinois* case, *supra*. With legislation actually introduced clearly applicable to petitioners' rights, an even stronger case for retention of jurisdiction was presented.

(c) Hasty action of the trial court in transferring the Debtor's property without the requisite retention of jurisdiction tended to usurp the power of Congress.

The Congressional intent to correct the deficiencies in Section 77 procedure was clearly evidenced when, on July 31, 1946, the Wheeler-Reed Bill was passed, as petitioners' motion had alleged might happen. Its specific intention to correct the apparent injustice done the petitioners herein was evidenced by Section 2(15) of that bill, set forth in Appendix B hereto. Further, although the President allowed the bill to die by failing to sign it within the time allowed by law, in his memorandum of disapproval issued on August 13, 1946, a clear executive intent is shown. Reading of the message, set forth in Appendix C hereto, shows that the President found no fault with the actual provisions of the bill but felt that it would fail to accomplish its purpose because it did not go far enough and the President suggested several respects in which he felt the bill should be amended to expand the relief. In the last paragraph of his message he stated that he believed Congress could enact a bill meeting his objections and affording protection to the rights of stockholders, as well as those of the railroads, the creditors, and the public generally. In *Wilson* v. *New*,

243 U.S. 332, 359, this Court said, in upholding the railroad eight-hour day law, that the very highest of judicial duties is to give effect to the legislative will, and in so doing carefully to abstain from permitting subjects exclusively within the field of legislative discretion to influence judicial opinion or to control judgment. It was also so held in *U.S.* v. *Jones,* 131 U.S. 1, 19; *Norman* v. *B. & O. R. Co.,* 294 U.S. 240, 311. In *U.S.* v. *Crescent Amusement Co.,* 323 U.S. 173, 187, this Court held that where Congress declared what the rule is to be, it is not for the court to pick and choose between competing business and economic theories in applying the law.

(d) Legislation such as Section 2(15) of the Wheeler-Reed Bill is a valid exercise of Congressional power, giving petitioners rights which should be recognized.

(1) Since no final decree had been entered in the trial court and no new rights had intervened, the court had jurisdiction over the parties and the property to grant the relief sought.

The final decree terminating proceedings under Section 77 had not yet been entered at the time petitioners presented their motion to the trial court. The court clearly had jurisdiction over the parties and the property of the debtor to enter any order. As was said in the case of *In re Chicago, M. St. P. & P. R. Co., Abrams, et al.* v. *Scandrett, et al.,* 138 F. 2d 235-236, since the proceedings and orders of a bankruptcy court are interlocutory until entry of the discharge, they may be modified and rescinded before final decree, and, if no intervening rights will be prejudiced, the court may grant a rehearing. At the time of the presentation of the motion to modify, within the period of appeal from the order transferring the property, no new rights had intervened and the court had

jurisdiction over the property being transferred and all of the parties to the proceeding. *Meyer* v. *Kenmore-Granville Hotel Co.*, 297 U.S. 160; *Simmons Co.* v. *Grier Bros. Co.*, 258 U.S. 82; *In re Prima Co.*, 88 F. 2d 785, 788; *Baltimore & O. R. Co.* v. *U.S.*, 279 U.S. 781, 786; and see also *Robert T. Swaine* in 56 Harvard Law Review 1193 at 1224.

(2) The bankruptcy and commerce powers of Congress permit the impairment of rights which may have vested.

In *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago, R. I. & P. R. Co.*, 294 U.S. 648, 672, 680, this Court stated in connection with Section 77 proceedings that the Constitution does not prevent Congress from impairing the obligations of contracts as it does the states, although it is limited to the passage of legislation pertinent to the powers conferred upon it by the Constitution. The bankruptcy power is plenary. A court of bankruptcy may affect the interests of security holders in many ways. *Wright* v. *Union Central Life Insurance Co.*, 304 U.S. 502, 517; *Kuehner* v. *Irving Trust Co.*, 299 U.S. 445, 450. The same is true of the commerce power of Congress. *Louisville and N. R. Co.* v. *Motley*, 219 U.S. 467, 480.

(3) No rights have vested in any party to this proceeding in a particular remedy or method of procedure which Congress cannot change

Section 77 of the Bankruptcy Act, as amended, sets forth the particular procedure for effectuating the reorganization of railroads in financial difficulties. Anything done under that Act and the rights of any parties affected by it are always subject to the power of Congress to amend, and the parties are presumed to know that at all times. The fact that a particular method of reorganizing is subsequently changed does not render the legislation

changing it unconstitutional. In *Doty* v. *Love*, 295 U.S. 64, a state statute which empowered the chancery court to reopen a bank closed before the passage of the statute in accordance with a plan proposed by at least three-fourths of the creditors and recommended by the superintendent of banks, was held to be constitutional because such act merely changed the method of liquidation and did not impair contractual rights or annul rights of property. This was true even though creditors were denied relief against stockholders of the closed bank, relief to which they were entitled by statute at the time the bank closed. In *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 316, it was held that a state legislature might enact a statute of limitations in respect to actions based on violations of a state law which had the effect of lifting the bar of a previously applicable statute of limitations. The fact that at the time a suit was commenced the existing statute of limitations would have been a good defense did not mean that the legislature could not change the statutory period removing such a defense while the litigation was pending.

(4) New legislation applicable by its terms to the Debtor must be applied so long as the court has jurisdiction over the property and the parties.

Where legislation is passed pending an appeal it must be applied to the proceedings at the time of review.

Courts have consistently applied legislation where it is applicable by its terms to existing controversies if there has been a change in the law between a decision in a trial court and a final disposition of the matter. *Carpenter* v. *Wabash Railway Co.*, 309 U.S. 23; *Ziffrin, Inc.* v. *U.S.*, 318 U.S. 73; *U.S.* v. *Schooner Peggy*, 1 Cranch 103; *Dinsmore* v. *Southern Express Co.*, 183 U.S. 115; *Massey* v. *U.S.*, 291 U.S. 608. Whether the new law is to be applicable

by its terms is for Congress and not the courts to decide. Retrospective legislation is not unconstitutional with respect to civil matters.

(e) The trial court abused its discretion in denying petitioners' motion.

The rights of petitioners were foreclosed by the order of November 26, 1945, unless the retention of jurisdiction requested were allowed. There was absolutely no showing by any of the parties opposing the motion that any party would have been harmed had the court retained jurisdiction for the limited time and limited purpose requested. There would have been no delay in carrying out the provisions of the order of November 26 and it was therefore an abuse of discretion to deny the motion.

The result of the trial court's ruling, approved by the Circuit Court of Appeals, is two-fold:

(1) Junior creditors and stockholders of The Chicago, Rock Island and Pacific Railway Company, Debtor, were, by the same trial court, given the protection of pending legislation six months after petitioners were deprived thereof, which inequality of treatment should not be tolerated.

On June 28, 1946, District Judge Michael L. Igoe, the same trial judge who has presided in the proceedings below herein, rendered an opinion, set forth in Appendix D hereto, wherein he refused to proceed further with the reorganization for The Chicago, Rock Island and Pacific Railway Company, Debtor, refused to confirm the plan, and remanded the proceedings to the Commission, basing his order upon the pending legislation and the Congressional intent evidenced thereby, as well as by the reports and hearings on such legislation.

The inequality of treatment, based upon the fortuitous circumstance of a few months' difference in time of presentation, between the stockholders of the Rock Island railroad, and those of the Milwaukee railroad should not be countenanced. A court of bankruptcy sits as a court of equity. Equity is equality. *American United Mut. Life Ins. Co.* v. *Avon Park,* 311 U.S. 138, 145; *Securities and Exchange Commission* v. *U.S. Realty & Improvement Co.,* 310 U.S. 434, 455; *United States Rubber Co.* v. *American Oak Leather Co.,* 181 U.S. 434, 453; *International Bank* v. *Sherman,* 101 U.S. 403, 406; *Brill* v. *W. B. Foshay Co.,* 65 F. 2d 420, 424-425.

(2) A bad precedent is set by the action of the lower courts in refusing retention of jurisdiction since by inference the parties are forced to resort to obstruction of adjudication to obtain the benefits of possible Congressional action.

Petitioners frankly recognized that as the law stood they had no rights under the plan of reorganization and that they were foreclosed from further attempting to change the plan of reorganization in any respect. By their motion they did not attempt to do so. Upon learning of the introduction of legislation which would recognize their rights, they promptly moved the court for a retention of jurisdiction over the property of the debtor and the parties to allow the benefits of such legislation, if it became law, to apply equally to them, as well as to the stockholders of the other railroads in reorganization. By its refusal to grant their motion, the court inferred that their only remedy was to attempt to delay the proceedings by appealing from the order of November 26, 1945, and thus seeking to keep the proceedings open long enough for Congress to act. Such delay is obviously to be avoided, as it was attempted to be avoided by peti-

tioners. *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U.S. 523.

By giving approval to a simple retention of jurisdiction, such as was here sought, the courts would establish a precedent which would save months of delay in future reorganization proceedings.

CONCLUSION.

The requested retention of jurisdiction, for the life of the Seventy-Ninth Congress and for the limited purpose of applying legislation to the Debtor's property which such Congress might enact into law and which otherwise would have applied, was so reasonable as to prove abuse of discretion in denying it, where no harm to any party was alleged or proven, and no delay in the proceedings would have resulted therefrom. Congressional intent to remedy the plight of railroads in reorganization under Section 77, resulting from present defects in the statute was evidenced to the trial court through the pending legislation and has been crystallized since by the passage thereof. Likewise since that time has been evidenced the executive agreement with such intent, through the President's message stating that he withheld his signature because it did not go far enough. The courts should do all in their power to give effect to such intent by avoiding hasty action which thwarts it. That Congress and the President will combine in enacting a remedial law at the earliest possible time seems assured. To refuse these petitioners the benefits of such a law is gross inequity.

WHEREFORE, petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered below on May 17, 1946.

Respectfully submitted,

HELEN W. MUNSERT,
Attorney for Petitioners.

APPENDIX A.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
for the Seventh Circuit

No. 9019 OCTOBER TERM, 1945, APRIL SESSION, 1946.

In the Matter of:
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, Debtor.

H. C. ORTON, *et al.*, As a Protective Committee, Etc.
Appellants,
vs.
GROUP OF INSTITUTIONAL INVESTORS, *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

May 17, 1946.

Before SPARKS, *Circuit Judge* and LINDLEY, *District Judge.*

PER CURIAM. Appellants assail an order of the District Court which denied their motion to enlarge said Court's reserved jurisdiction over the property of the debtor, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, in the reorganization proceedings wherein said railroad was debtor and which were closed by the order which contained the limited reservation of jurisdiction.

Appellants desired the Court to enlarge the jurisdiction reserved in its order of November 26, 1945, wherein it consummated the confirmed and approved plan of reorganization. The Court in its final order reserved jurisdiction only as follows:

> "(48) The Court hereby reserves jurisdiction for all purposes necessary to put into effect and carry out this order and the Plan of Reorganization and any other orders entered by this Court relative thereto, including, without limiting the generality of the foregoing, giving instructions and directions to the Trustees of the Debtor's property with respect to matters now pending or matters which may hereafter arise and passing upon the final statement of account of said Trustees, making allowances of fees or compensation for services heretofore or hereafter rendered and reimbursement of expenses heretofore or hereafter incurred in connection with these proceedings or the Plan, receiving and passing upon a report or reports by the Reorganization Committee on the expenses incurred by them in carrying out and putting into effect the Plan of Reorganization, receiving a report or reports by the Reorganization Committee of the action taken by them under the Plan and the orders of this Court to consummate the Plan, and taking any and all other action necessary to terminate these proceedings.'

The wider reservation sought in appellants' motion read:

> "(49) The Court further reserves jurisdiction over the property vested in the Reorganized Company by this order, over the Reorganized Company, over the Trustees, and over all other parties to this proceeding, for the purpose of entering an appropriate order, upon application being made by any party in interest, to apply to the Debtor and its property the provisions of any legislation hereafter becoming law which by its terms would have affected the Debtor had not this order been entered."

Upon the oral argument appellants, however, narrowed the scope of their motion by limiting the "any legislation"

to that which might be enacted by the present term of Congress.

The Court denied this motion. Appellants appealed. Appellees move to dismiss the appeal because (a) the order is not appealable; (b) the order was discretionary and the absence of abuse of discretion is so clear that the appeal should be dismissed as frivolous.* In the alternative appellees ask that the order appealed from be affirmed.

Chicago, Milwaukee, St. Paul and Pacific R. R. Co. Chronology is set forth in the footnote.**

Appellants are members of a protective committee, representing $7,500,000 of $119,307,300 preferred stock of the debtor company. The plan of reorganization (which wiped out this preferred stock) was approved by the Dis-

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* *Pfister* v. *Finance Corp.*, 317 U. S. 144; *Wayne Gas Co.* v. *Owens Co.*, 300 U. S. 131; *Old Colony Co.* v. *Kurn*, 138 F. 2d 394.

** 1928, Equity receivership in foreclosure of mortgage proceedings terminated in January.
1933, March 3. Amendment to Bankruptcy Act permitting reorganization of railroads.
1935, June 29. Present Section 77 proceedings instituted.
1937, December 16. Appellants intervened in these proceedings.
1940, February 12. Interstate Commerce Commission reported the plan of reorganization.
October 21. Plan approved by District Court (36 F. Supp. 193).
1941, December 3. On appeal, plan approved in part and reversed in part by this Court (124 F. 2d 754).
1943, March 15. Supreme Court affirmed plan with modifications. 318 U. S. 523.
1944, January 1. Effective date of plan.
April 10. Plan modified by Commission.
June 30. District Court order approving final plan.
July 29. Appeal from approval.
October 31. Appeal dismissed by CCA 7, 145 F. 2d 299; certiorari denied, 324 U. S. 857, 895.
1945, February 23. District Court order of Confirmation of Plan (no appeal).
May 22. Order of distribution of cash to certain creditors.
June 1. Cash distribution begun.
November 15. Interstate Commerce Commission approved acquisition of Debtor's property by Reorganized Company.
November 23. H. R. 4779 (Reed Bill) introduced in Congress.
November 25. Consummation Order (no appeal).
December 24. Appellants filed motion to modify November 26 order.
1946, January 3. Motion denied.
February 1. Appellants filed notice of instant appeal.

† Other appeals, 124 F. 2d 754, 318 U. S. 523.

trict Court on June 30, 1944 (appeals dismissed by this court, and certiorari denied in 145 F. 2d 299 and 324 U. S. 857, 895†), and was confirmed by the District Court, February 23, 1945. From this order of confirmation no appeal was taken. The property was turned over to the reorganized company on November 26, 1945, and no appeal was taken from the order authorizing that turnover. The effective date of the plan was January 1, 1944. The plan has been fully effected, and payments of dividends and interest have been made to the holders of the reorganized company's securities.

The reorganization plan entirely eliminated the $119,300,000 of preferred stock. It also destroyed property interests *superior* to that stock. General creditors having claims aggregating $766,583 received common stock having a value, on the date of the hearing, of $52,559. The plan as approved bore heavily on Adjustment Mortgage Bondholders who lost over $77,000,000 in interest, and on the balance of their principal and interest claims received common stock having the value of $64,440,058 on the date of the hearing of the motion, in full compensation for claims totalling $230,420,000. These bonds and claims were, of course, superior to the rights of preferred stockholders.

In the light of these facts, and the further significant fact that the peak of the railroad's recent spurt in financial prosperity is now behind it, and serious financial and other problems vex and perplex it, we feel one would have to be an "incorrigible optimist" to believe that the District Court should have retained jurisdiction of this already accomplished reorganization in the hope (1) that Congress would pass certain legislation, although it has failed to approve prior similar proposals, and (2) if it did, that the condition of the railroad would so improve as to give to appellants revitalized stock. Even if these two possibilities

were probable realities there would remain the essential fact that the instant reorganization is a completed achievement, and that any change in the status of security holders is not now legally justifiable. We can not ascribe to the trial court an abuse of discretion in concluding that the tenuous hope of appellants failed to warrant a still further prolonged postponement of the closing of the reorganization proceedings. On the contrary we feel the facts justify no other conclusion.

The appeal of these preferred stockholders is, as it was when we were considering the plan which had the approval of the Interstate Commerce Commission and the District Court, not easily denied. But our decision may not be determined by our sympathy. The inquiry was into a mass of facts. An examination of the plan, which was submitted by the holders of the bonds, as disclosed by the report of the Interstate Commerce Commission and the lower court, reveals how thoroughly these facts have been collected and studied.

We are also of the view that the order attacked is non-appealable, inasmuch as it merely denied the motion to vacate the order of consummation. There is no appeal from the order itself.‡ We are not persuaded to the contrary by appellants' argument that its knowledge of the pending proposed legislation, acquired subsequent to entry of the consummation order, makes the general rule inapplicable, especially in view of the uncertainty of the passage of the Reed Bill, or any similar legislation, and of the relative equities of all the parties to the now effected reorganization.

Judge Evans presided in this case on April 12, 1946. He

‡ *In re Gelino*, 51 F. 2d 875; *Bass* v. *B. & O. Terminal Co.*, 142 F. 2d 779; *Old Colony Trust Co.* v. *Kurn*, 138 F. 2d 394; *Pfister* v. *Finance Corp.*, 317 U. S. 144; *Wayne Gas Co.* v. *Owens Co.*, 300 U. S. 131; *In re Witthoft*, 98 F. 2d 972.

became seriously ill on April 30. Since that time he has been unable to participate in the proceedings of this court, and it is not probable that he will be able to do so at any time soon. The three judges who heard this case have been at all times in complete accord with the views expressed in this opinion.

The appeal is dismissed.

APPENDIX B.

S. 1253

An Act to enable debtor railroad corporations, whose properties during a period of seven years have provided sufficient earnings to pay fixed charges, to effect a readjustment of their financial structures, to alter or modify their financial obligations; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled

That (1) it shall be lawful (any express provision contained in any mortgage, indenture, deed of trust, or other instrument to the contrary notwithstanding), with the approval and authorization of the Interstate Commerce Commission (hereinafter referred to as the Commission), as provided in paragraph (2) hereof, for a carrier as defined in section 20a (1) of Part I of the Interstate Commerce Act to alter or modify (a) any provision of any class or classes of its bonds, notes, debentures, or other indebtedness, (whether secured, unsecured, matured, or unmatured) issued under any mortgage, indenture, deed of trust, or other instrument, or otherwise created, such bonds, notes, debentures, or other evidences of indebtedness being hereinafter in this section sometimes called "obligations"; (b) any provision of any mortgage, indenture, deed of trust, or other instrument pursuant to which any class of its obligations shall have been issued or by which any class of its obligations is secured: Provided That the provisions of this section shall not apply to any equipment-trust certificates in respect of which a carrier

is obligated, or to any evidences of indebtedness of a carrier the payment of which is secured in any manner solely by equipment, or to any instrument, whether an agreement, lease, conditional-sale agreement, or otherwise, pursuant to which such equipment-trust certificates or such evidences of indebtedness shall have been issued or by which they are secured.

(2) Whenever an alteration or modification is proposed under paragraph (1) hereof, the carrier seeking authority therefor shall, pursuant to such rules and regulations as the Commission shall prescribe, present an application to the Commission. The Commission shall set such application for public hearing and the carrier shall give such notice of such hearing in such manner, by advertisement or otherwise, as the Commission may find practicable and may direct, to holders of such of its classes of securities and to such other persons in interest as the Commission shall determine to be appropriate and shall direct. If the Commission, after hearing, in addition to making (in any case where such alteration or modification involves an issuance of securities) the findings required by paragraph (2) of said section 20a, shall find that, subject to such terms and conditions (not constituting alterations or modifications of obligations or securities) and with such amendments (altering or modifying the obligations affected by the alteration or modification proposed by the carrier) as the Commission shall determine to be just and reasonable, the proposed alteration or modification—

(a) is within the scope of paragraph (1);

(b) will be in the public interest;

(c) will be in the best interests of the carrier and of the holders of each class of its obligations affected by such modification or alteration; and

(d) will not be adverse to the interests of the holders of any other class of the carrier's securities or to

the interests of any creditor of the carrier not affected by such modification or alteration,

then (unless the applicant carrier shall withdraw its application) the Commission shall cause the carrier, in such manner as it shall direct, to submit the proposed alteration or modification (with such terms, conditions, and amendments, if any) to the holders of each class of its obligations affected thereby, for acceptance or rejection. If the Commission shall find that as a result of such submission the proposed alteration or modification has been assented to by the holders—

(i) of at least 66⅔ per centum of the aggregate principal amount outstanding of each class of obligations affected thereby; or

(ii) of less than 66⅔ per centum but not less than 51 per centum of any particular class or classes of securities affected, and the Commission, after hearing, finds that such reduction in percentage will be just and reasonable and in the public interest; or

(iii) in any case where 66⅔ per centum thereof is held by fewer than twenty-five holders, of such larger percentage, if any, as the Commission, after hearing, finds will be just and reasonable and in the public interest;

the Commission shall enter an order approving and authorizing the proposed alteration or modification upon the terms and conditions and with the amendments, if any, so determined to be just and reasonable. Such order shall make provision as to the time when such alteration or modification shall become and be binding, which may be upon publication of a declaration to that effect by the carrier, or otherwise, as the Commission may determine. Any alteration or modification which shall become and be binding pursuant to the approval and authority of the Commission hereunder shall be binding upon each holder of any obligation of the carrier of each class affected by such alteration or modification, and upon any trustee or

other party to any instrument under which any such class of obligations shall have been issued or by which it is secured, and when any alteration or modification shall become and be binding the rights of each such holder and of any such trustee or other party shall be correspondingly altered or modified.

(3) For the purposes of this section a class of obligations shall be deemed to be affected by any modification or alteration proposed only (a) if a modification or alteration is proposed as to any provision of such class of obligations, or (b) if any modification or alteration is proposed as to any provision of any instrument pursuant to which such class of obligations shall have been issued or shall be secured: Provided, That in any case where more than one class of obligations shall have been issued and be outstanding or shall be secured pursuant to any instrument, any alteration or modification proposed as to any provision of such instrument, which does not relate to all of the classes of obligations issued thereunder, shall be deemed to affect only the class or classes of obligations to which such alteration or modification is related. For the purpose of the finding of the Commission referred to in paragraph (2) of this section as to whether the required percentage of the aggregate principal amount outstanding of each class of obligations affected by any proposed alteration or modification has assented to the making of such alteration or modification, any obligation which secures any evidence or evidences of indebtedness of the carrier or of any company controlling or controlled by the carrier shall be deemed to be outstanding unless the Commission in its discretion determines that the proposed alteration or modification does not materially affect the interests of the holder or holders of the evidence or evidences of indebtedness secured by such obligation. Whenever any such pledged obligation is, for said pur-

poses, to be deemed outstanding, assent in respect of such obligations, as to any proposed alteration or modification, may be given only (any express or implied provision in any mortgage, indenture, deed of trust, note, or other instrument to the contrary notwithstanding) as follows: (a) where such obligation is pledged as security under a mortgage, indenture, deed of trust, or other instrument, pursuant to which any evidences of indebtedness are issued and outstanding, by the holders of a majority in principal amount of such evidences of indebtedness, or (b) where such obligation secures an evidence or evidences of indebtedness not issued pursuant to such a mortgage, indenture, deed of trust, or other instrument, by the holder or holders of such evidence or evidences of indebtedness; and in any such case the Commission, in addition to the submission referred to in paragraph (2) of this section, shall cause the carrier in such manner as it shall direct to submit the proposed alteration or modification (with such terms, conditions, and amendments, if any, as the Commission shall have determined to be just and reasonable) for acceptance or rejection, to the holders of the evidences of indebtedness issued and outstanding pursuant to such mortgage, indenture, deed of trust, or other instrument, or to the holder or holders of such evidence or evidences of indebtedness not so issued, and such proposed alteration or modification need not be submitted to the trustee of any such mortgage, indenture, deed of trust, or other instrument, but assent in respect of any such obligation shall be determined as hereinbefore in this section provided. For the purpose of any such assent the evidences of indebtedness issued and outstanding under any such mortgage, indenture, deed of trust, or other instrument shall be determined by the Commission.

(4) (a) Any authorization and approval hereunder of any alteration or modification of a provision of any class

of obligations of a carrier or of a provision of any instrument pursuant to which a class of obligations has been issued, or by which it is secured, shall be deemed to constitute authorization and approval of a corresponding alteration or modification of the obligation of any other carrier which has assumed liability in respect of such class of obligations as guarantor, endorser, surety, or otherwise: Provided, That such other carrier consents in writing to such alteration or modification of such class of obligations in respect of which it has assumed liability or of the instrument pursuant to which such class of obligations has been issued or by which it is secured, and, such consent having been given, any such corresponding alteration or modification shall become effective, without other action, when the alteration or modification of such class of obligations or of such instrument shall become and be binding.

(b) Any person who is liable or obligated contingently or otherwise on any class or classes of obligations issued by a carrier shall, with respect to such class or classes of obligations, for the purposes of this section, be deemed a carrier.

(5) The authority conferred by this section shall be exclusive and plenary and any carrier, in respect of any alteration or modification authorized and approved by the Commission hereunder, shall have full power to make any such alteration or modification and to take any actions incidental or appropriate thereto, and may make any such alteration or modification and take any such actions, and any such alteration or modification may be made without securing the approval of the Commission under any other section of the Interstate Commerce Act or other paragraph of this section, and without securing approval of any State authority, and any carrier and its officers and employees and any other persons, participating in the

making of an alteration or modification approved and authorized under the provisions of this section or the taking of any such actions, shall be, and they hereby are, relieved from the operation of all restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to make and carry into effect the alteration or modification so approved and authorized, in accordance with the conditions and with the amendments, if any, imposed by the Commission. Any power granted by this section to any carrier shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State. The provisions of this section shall not affect in any way the negotiability of any obligation of any carrier or of the obligation of any carrier which has assumed liability in respect thereto.

(6) The Commission shall require periodical or special reports from each carrier which shall hereafter secure from the Commission approval and authorization of any alteration or modification under this section, which shall show, in such detail as the Commission may require, the action taken by the carrier in the making of such alteration or modification.

(7) The provisions of this section are permissive and not mandatory and shall not require any carrier to obtain authorization and approval of the Commission hereunder for the making of any alteration or modification of any provision of any of its obligations or of any class thereof or of any provision of any mortgage, indenture, deed of trust, or other instrument, which it may be able lawfully to make in any other manner, whether by reason of provisions for the making of such alteration or modification in any such mortgage, indenture, deed of trust, or other instrument, or otherwise: Provided, That the provisions of paragraph (2) of said section 20a, if applicable to

such alteration or modification made otherwise than pursuant to the provisions of this section, shall continue to be so applicable.

(8) The provisions of paragraph (6) of said section 20a, except the provisions thereof in respect of hearings, shall apply to applications made under this section. In connection with any order entered by the Commission pursuant to paragraph (2) hereof, the Commission may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any such order, subject always to the requirements of said paragraph (2).

(9) The provisions of subdivision (a) of section 14 of the Securities Exchange Act of 1934 shall not apply to any solicitation in connection with a proposed alteration or modification pursuant to this section.

(10) The Commission shall have the power to make such rules and regulations appropriate to its administration of the provisions of this section as it shall deem necessary or desirable.

SEC. 2. (1) All proceedings under section 77 of the Bankruptcy Act, whether before the Interstate Commerce Commission or United States courts, relating to the preparation or effectuation of plans of reorganization of each carrier by railroad as defined in said section 20a (1) whose properties on the effective date of this Act or at any time thereafter are in the custody of the United States courts, shall be forthwith suspended and discontinued as of the effective date of this Act—

(A) If the gross railway operating revenues of such carrier for any of the calendar years 1942 to 1944, inclusive, were in excess of $50,000,000; or if its gross railway operating revenues were not in

excess of such amount, such carrier is a debtor in any such proceeding, or is a party defendant in any proceeding ancillary thereto, with another such carrier whose revenues were so in excess; and

(B) If, for the period of seven calendar years from 1939 to 1945, inclusive, the total of the income reported to the Commission as income available for fixed charges, plus (a) the total of any amounts so reported as a deficit for fixed charges in any of said seven years to the extent of the total of any amounts reported for Federal income and excess-profits taxes in any of said years, and (b) amounts deducted in any year for amortization of emergency facilities under section 124 of the Internal Revenue Code in excess of 20 per centum of the cost of such facilities, of such carrier, or, on a joint or consolidated basis, of the carriers in the system of which such carrier is a part, or of such carrier and other carriers, directly or indirectly controlled by it, through direct or indirect ownership of at least a majority of their stock, is at least equal to the reported total fixed charges (other than charges on intercompany obligations) of such carrier or carriers for such period.

(2) Carriers to which paragraph (1) of this section is applicable shall institute proceedings and file application under section 1 of this Act as expeditiously as practicable but in no event later than eighteen months after the effective date of this Act, or such longer period as the Commission, on application, may approve.

(3) The properties of any carrier specified in paragraph (1) of this section shall continue in the custody of the United States courts having custody of them; except that, the following portions of said section 77 shall not be applicable in any such case:

(a) The first two paragraphs of subsection (b).

(b) Subdivision (1) of subsection (c).

(c) The first five sentences, and the first seven words and the last twenty-two words of the sixth sentence, of subdivision (2) of subsection (c): Provided,

That for the purposes of this section there shall be substituted for the said last twenty-two words of said sixth sentence, the words "custody and supervision of the judge".

(d) Subsections (d), (e), (f), and (k).

In addition to the foregoing exceptions and for the same purpose of applying to such carriers in the cases in which and during the period for which such custody is held under said section 77, and pending the consummation of proceedings under section 1 of this Act, the word "debtor" shall be substituted for the words "trustee or trustees" wherever such latter words occur in subdivisions (3), (5), (9), and (10) of subsection (c), and subsections (i) and (o), of said section 77. The provisions of subsection (12) of subsection (c) of said section 77 shall be applicable to proceedings under this Act. The final determination heretofore or hereafter made in the United States courts with respect to the relative priorities as between the respective classes of security holders, the subordination of the interest of a creditor or security holder of the debtor to the interest of other creditors or security holders, or the validity, amount and priority of any claim shall continue in full force and effect. Nothing contained in this Act is intended or shall be construed to modify or rescind any such determination or to prevent or delay the prosecution to final determination of any such issue now pending, and not yet finally determined, in the United States courts. Nothing in this Act shall be deemed to limit, qualify or restrict the right of the debtor (which right of the debtor is hereby confirmed), with the approval of the court (a) to purchase in whole or in part any bond issues or other obligations of the debtor (including bonds or other obligations guaranteed or assumed by the debtor), at a discount or otherwise, provided that the court's approval of the debtor's purchase of any such obligations junior in lien to first lien mortgage bonds shall be granted only if the

court finds, after hearing, that such purchase will be for the best interests of the estate of the carrier and will not deprive the holders of obligations senior in lien to the obligations proposed to be purchased, of adequate security and protection; (b) to hold or to retire and cancel any of its bonds or other obligations now held or hereafter acquired by the debtor; and (c) to make voluntary agreements or compromises with any creditor or creditors as to either principal or interest of his or their claims or the security therefor, provided that the court shall find, after hearing, that any such agreement or compromise will be in the best interests of the estate of the carrier and will not unjustly or inequitably affect the claims or security of other creditors.

(4) The proceedings with respect to any such carrier specified in paragraph (1) of this section under section 77 of the Bankruptcy Act shall be dismissed upon consummation of proceedings affecting such carrier under section 1 of this Act, or upon payment of its matured, unpaid obligations, or the making of other arrangements with reference to such obligations satisfactory to the owners of the claims therefor; and such proceedings may be dismissed under the conditions and in the manner prescribed in subsection (g) of section 77 of the Bankruptcy Act: Provided, That in the event there has been a determination by the United States courts with respect to subordination of any claim, or the issue thereon has not been finally determined, the determination of that one issue, and only that issue, shall be continued and prosecuted to completion and shall be binding on the security holders of such company; but such continuance of the determination of that sole issue shall not delay the dismissal of the proceedings in any and every other respect.

(5) The appointment, term of office, powers, authority, compensation and fees of each trustee appointed by the

court, and of each counsel of such trustee, shall be terminated on or before sixty days after the effective date of this Act: Provided, That if the board of directors of the carrier shall have been elected, pursuant to the provisions of paragraph (11) of this section, prior to the expiration of the afore-mentioned sixty-day period, the appointment, term of office, powers, authority, compensation and fees of such trustees and counsel shall be terminated forthwith.

(6) The provisions of this section shall not apply if at the time of filing the petition for reorganization under section 77 of the Bankruptcy Act as amended, more than 95 percent of the outstanding voting stock of the debtor railroad corporation shall have been owned or controlled, directly or indirectly, by voting trust or otherwise, by another railroad corporation not a debtor in the same proceeding under the said section 77 with the said debtor and/or by a corporation owning or controlling more than 95 percent of the outstanding voting stock of another railroad corporation; provided also, that this section shall not apply to a railroad corporation if (1) all of its stock is owned directly or indirectly by an operating railroad corporation, (2) both corporations are in the same proceeding under the said section 77, and (3) pursuant to the provisions in this paragraph, this section does not apply to the said operating railroad corporation which owns all of the stock of the said controlled railroad corporation. The term "corporation" as used in this paragraph shall be deemed to include its trustees appointed under the aforesaid section 77 of the Bankruptcy Act.

(7) If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of

which is owned by the United State of America, is a creditor or stockholder of any such carrier, the President of the United States or any officer or agency he may designate, is hereby authorized to act in respect of the interest or claims of the United States or of such agency or other corporation.

(8) The Commission shall designate one or more qualified members of its staff to serve as mediator or mediators in each of the proceedings under section 1 with respect to carriers specified under paragraph (1) of this section for the purpose of bringing the different classes of creditors and other security holders together, of being available to advise with them, of assisting in the effectuation of changes, compromises, arrangements, negotiations, and dealings with the various classes of creditors and other security holders and with individuals, groups, and committees representing creditors or other security holders, of assisting in expediting all stages of the proceedings and the early termination and the consummation of all transactions hereunder, including all steps requisite for the effectuation thereof.

(9) In proceedings under section 1 with respect to a carrier specified in paragraph (1) of this section the Commission shall have the power, in its discretion, to submit to holders of obligations, any proposed alteration or modification affecting them which the Commission has caused the carrier to submit to such holders under the provisions of the fourth sentence of paragraph (2) of section 1 hereof; in the event that it is satisfied that such alteration or modification has been accepted by or on behalf of creditors of each class to which submission is required under section 1 holding more than two-third in amount of the total of the allowed claims of such class which have voted on said alteration or modification, the

Commission shall enter an order approving and authorizing the proposed alteration or modification as provided in said paragraph (2) of section 1 hereof: Provided, That it shall enter such order in any case in which such alteration or modification has not been so accepted by the creditors of any class or classes if it finds, after hearing, that the alteration or modification makes adequate provision for fair and equitable treatment for the claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting them and all the relevant facts; and that the alteration or modification is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, and will conform to the requirements of the law of the land.

(10) If after having submitted a proposed alteration or modification to holders of affected obligations as provided in paragraph (9), the Commission shall not have entered an order approving and authorizing such proposed alteration or modification within a period of twelve months following the date of the filing of an application in accordance with paragraph (2) of this section, or such extended periods as the Commission on application therefor may approve, then the Commission, after hearings, shall formulate and submit to holders of affected obligations such alteration or modification as in its opinion meets the standards set forth in section 1 above; in applying such standards of section 1 for the purpose of any such alteration or modification under this paragraph, the Commission shall give full effect to all changes, facts, and developments since 1940, including, without limitation, for such period total railway operating revenues, operating expenses and other charges, net earnings, the full effect of amortization deductions on earnings of

past and future years, improvements to the property, the effect of the released collateral through past or future payment of loans, cash and net current assets, retirements and purchase of debt, including retirements and purchases at a discount that have been made or that can reasonably be made, adjustment and reduction of interest rates on outstanding debt that may be made including the adjustment and reduction of interest rates for prior years. In the event the Commission is satisfied that such alteration or modification has been accepted by the percentages required for acceptance under the provisions of section 1 or of paragraph (9) of this section it shall enter an order approving and authorizing such alteration or modification, unless it finds that, prior to the entry of such order, the alteration or modification submitted under paragraph (9) has been accepted by the percentages required by the provisions of that paragraph or of section 1, in which event it shall enter an order approving and authorizing such alteration or modification submitted under paragraph (9).

(11) (a) Every carrier to which paragraph (1) of this section is applicable shall call a meeting of stockholders for the election of directors to be held within sixty days after the effective date of this Act. The present terms of office of all directors and officers of such carrier shall terminate upon the election and qualification of their successors, as herein provided, notwithstanding any provision of the charter or by-laws of such carrier or of any State law to the contrary. The terms of office of all directors elected at such meeting shall be the unexpired terms of present directors.

(b) No holding company, individual, group, partnership, association, corporation, or other entity (excluding any operating common carrier subject to Part I of the

Interstate Commerce Act, but not excluding any holding company or other nonoperating corporation which has been held or which may be held to be a common carrier within the meaning of said Act)—

(A) which exercises direct or indirect control of one or more railroad corporations the properties of which are not in the custody of a court in proceedings under section 77 of the Bankruptcy Act; and

(B) which also owns shares of voting stock of any railroad corporation to which this Act is applicable, in sufficient number to enable the owner thereof to control such carrier.

shall, during the period the debtor shall be in possession of its properties and in control of the management and operation thereof under this Act, vote such shares for the election of more than a minority of the directors of any railroad corporation to which this Act is applicable.

(c) No stock of any common carrier to which paragraph (1) of this section is applicable, which stock is owned or controlled directly or indirectly by, or held for the benefit of, or pledged as security by, any other common carrier to which paragraph (1) of this section is applicable, shall be voted for the election of directors during the proceedings under this Act, unless at the time of filing the petition for reorganization under section 77 of the Bankruptcy Act as amended, the transaction or transactions by which such stock was acquired, and the ownership and control of such stock had been approved by the Interstate Commerce Commission pursuant to the applicable provisions of section 5 of the Interstate Commerce Act, as amended ceeding under section 77 of the Bankruptcy Act, as amended.

(d) In the determination of whether a quorum is represented in attendance at any meeting of stockholders of any carrier to which paragraph (1) of this section is

applicable, held during the pendency of proceedings under this Act, for the election of directors or for other purposes, all voting stock standing in the name of, or held for the benefit of or pledged or assigned by, or directly or indirectly controlled by, any carrier, holding company, individual, corporation or other entity to which subparagraph (b) or (c) of this paragraph (11) is applicable, which voting stock may be not represented at said meeting shall nevertheless be considered and counted as being represented in attendance at such meeting, notwithstanding any provision of the charter or by-laws of such carrier or the provision of any State law to the contrary.

(12) Any party having properly filed an application under section 5 of the Interstate Commerce Act to control, or participate in the control of, a carrier to which section 2 of this Act applies, is hereby authorized to intervene generally in and become a party to the proceedings under this Act effecting such carrier.

(13) No readjustment of financial structure or other proceeding under this Act and no order of the court or Commission in connection therewith shall relieve any carrier from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929, against such carrier or against one of its predecessors in title, requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered on account of the making of a valid contract or contracts by such carrier or one of its predecessors in title.

(14) In judicial review of any order of the Commission approving or authorizing a proposed alteration or modification entered pursuant to the authority of paragraph (10) of this section 2, the court (and any court on review thereof) shall not be concluded by any determination or

finding made by the Commission as to matters either of law or of facts, and the court shall make full and independent reexamination and review of the issues and of the evidence and thereafter shall arrive at a decision in the exercise of its independent judgment based upon such judicial reexamination and review. Any order of the Circuit Court of Appeals relating to any alteration or modification under paragraph (10) of this section 2 shall be reviewed by the Supreme Court of the United States upon appeal made by any person affected by the plan who deems himself aggrieved within sixty days after the entry of such order or decree, pursuant to the applicable provisions of the Judicial Code.

(15) In the case of any carrier which is under the jurisdiction of the United States Courts on the effective date of this Act, and to which the provisions of paragraph (1) of section 2 of this Act would be applicable if such carrier were in the custody of such courts on such date, and with respect to which carrier, securities under a plan of reorganization approved by the court and Commission had already been issued, a holder of a security of any class which rejected, or was not entitled to vote on, such plan in accordance with subsection (e) of said section 77, may, within ninety days after the date of enactment of this Act, apply to the Commission for amendment of the plan to the extent necessary to permit the issuance, to holders of securities of such class, of options or warrants as described in subsection (b) of said section 77. If the Commission shall find after hearings that the proceeds of the exercise of such options or warrants will be applied in conformance with the requirements of section 20 (a) of the Interstate Commerce Act (including, without limitation, the application of such proceeds to the retirement of outstanding obligations of the carrier), it shall

approve such application and shall order the carrier to issue such options or warrants.

Sec. 3. The provisions of sections 1801, 1802, 3481, and 3482 of the Internal Revenue Code and any amendments thereto, unless specifically providing to the contrary, shall not apply to the issuance, transfer, or exchange of securities or the making or delivery of conveyances to make effective any alteration or modification effected pursuant to section 1 or section 2 of this Act. No income, gain, or profit taxable under any law of the United States or of any State, now in force, or hereafter enacted, shall be deemed to have accrued to or have been realized by such carrier by reason of such an alteration or modification, or by reason of any transaction authorized in the last sentence of paragraph (3) of section 2.

Sec. 4. If any provisions of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances, shall not be affected thereby.

APPENDIX C

TEXT OF THE PRESIDENT'S MEMORANDUM OF DISAPPROVAL.

I am withholding my approval of S. 1253, entitled "An act to enable railroad corporations, whose properties during a period of seven years have provided sufficient earnings to pay fixed charges, to effect a readjustment of their financial structures; to alter or modify their financial obligations; and for other purposes."

Even though I am familiar with the deficiencies and inequities and the evils that exist under Section 77 of the present bankruptcy act, I fear that this new bill will not accomplish the purpose for which it was intended.

The bill contains two sections, the first of which contemplates the prevention of bankruptcy proceedings where practicable; the second contemplates the reorganization of certain railroad carriers by the institution of proceeding under Section 1 of the bill for readjustment of their financial affairs.

Objections which I have to the bill include the following:

The bill fails to direct specifically the immediate reduction of the grossly excessive interest rates now wasting the funds of the railroads in Section 77 proceedings by reducing the interest rates on their bonds and other debt down to the level of the interest rates paid by railroads not in Section 77 proceedings. I reiterate a statement which I made in my message to Congress on the state of the union which is as follows, "Low interest rates will be an important force in promoting the full production and

full employment in the postwar period for which we are all striving."

The bill does not adequately cure the evil, present in reorganizations under Section 77, of permitting improper controls of railroads after their reorganization.

The bill fails to provide full protection against forfeiture of securities and investments.

The level of fees and expenses in reorganization cases under Section 77 has been excessive. This is not corrected in this bill. Affirmative provisions to curb this evil and to bring it under strict control should be included in any bill which may be enacted.

The bill excludes from its benefits certain railroads which should be brought within its provisions if it is to become law. In this regard it appears that the $50,000,000 limitation in Section 2 of the bill would exclude some railroads for whose exclusion there appears to be no logical justification.

This bill fails to correct a serious abuse which I condemned in the course of the Senate railroad investigation. I refer to the abuse of diverting, under cover of a reorganization plan, the funds of a railroad for the purchase of its own stocks in the market.

On the other hand, the bill does incorporate principles for which I was one of the sponsors in the Senate. I commend particularly the emphasis which the bill places on the principle that reorganizations must give primary consideration to the public interest, and to the best interests of the railroads which are being reorganized.

This requires among other things that reorganizations shall place control of railroads in persons primarily concerned with transportation for the communities served and for the nation as a whole, without any strings direct

or indirect, conditional or otherwise to institutions or others in distant financial centers.

Such regard for the public interest will also help the stockholders, whether they be railroad employes who have invested in the stocks of the companies for which they work, or ordinary investors, desirous of safeguarding their investments, but not of helping any interest, to capture control of their railroad. These stockholders, whom the bill justly seeks to protect against forfeiture, can and should get such protection, but without enabling any financial interests to use such legislation to acquire control.

By withholding my signature to this bill I do not intend to indicate that I favor the pending reorganization plans. I am in agreement with these objectives of the bill which prevent undesirable control of the railroads, either immediately or within a few years, and which prevent forfeitures of securities.

I believe that the next Congress can pass a bill which will meet the stated objections and which will be in the best interests of the public, the railroads, the bondholders and other creditors, and the stockholders.

APPENDIX D

In the Matter of the Chicago, Rock Island and Pacific Railway Company, Debtor—No. 53209.

Memorandum Opinion

Confirmation is sought by these proceedings of the Plan of Reorganization for the Debtors, as modified and approved by the Interstate Commerce Commission, hereinafter called the "Commission", in its Supplemental Report and Order of May 1, 1944.

Certification has been made heretofore to this Court by the Commission of the results of the submission to the various classes of creditors entitled to vote on the Plan. An approval of the plan in excess of a two-thirds majority was expressed by each class of creditors, save two; the Convertible Debenture bondholders whose vote for approval was slightly in excess of 24% and the Little Rock and Hot Springs Western Bondholders whose vote for approval amounted to 19%.

Subsection (e) of Section 77 of the Bankruptcy Act makes it mandatory upon the Court to confirm the Plan if more than two-thirds of all classes of creditors concerned so vote. Said subsection likewise "provides that, if the plan has been rejected, 'the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e)'."

Said clause (1) of the first paragraph of subsection

(e) provides that the Court may approve a plan if satisfied that it is "fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors and stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders."

Subsection (e) further provides that if the Judge shall not confirm the Plan he shall file an opinion with a statement of his conclusions and his reasons therefor and enter an order in which he shall either dismiss the proceedings, or in his discretion and on the motion of any party in interest refer the case back to the Commission for further proceedings, including the consideration of modifications of the Plan or the proposal of new plans.

Before proceeding further the Court wishes to divert for a moment and point out what has transpired in the interval following the approval of the Plan on June 15, 1945 by this Court, and the present.

An ever growing wave of criticism directed against the Commission and the District Courts for the drastic reductions in capitalization effected by their plans of reorganization finally culminated in Congress giving extensive study to proposed remedies.

Exhaustive hearings were hold by committees of both Houses of Congress and in the hearings before the Committee on Interstate Commerce of the Senate, during February and March of this year, many new ideas were advanced regarding the subject of railroad reorganization culminating in the passage of Senate Bill 1253 on June 15, 1946—which bill now awaits House consideration.

Apropos of the widespread dissatisfaction with these reorganizations let me quote from the printed record of the hearings which were held in connection with Senate Bill 1253.

Senator Wheeler, Chairman of the Committee, stated in the printed record (p. 516):

"If you had not had these changed conditions (the improvement of railroad finances during the war years) there would not have been this complaint we have from all the country, from stockholders and bondholders and everybody else. I just don't believe that the Commission ought to hesitate at all to say that in view of the changed conditions there ought to be some changes."

To which Commissioner Mahaffie of the Interstate Commerce Commission agreed by saying:

"Well, I think that there should * * * be no hesitancy at all."

And the Senator goes on (p. 412);

"The reason we have tried to work out something in this committee is because of the terrific pressure that has been put on the committee and the Congress by Members of the Senate and their own constituents to pass the Hobbs bill. We have tried to work out something not as drastic as the Hobbs bill."

It must be remembered, in fairness, that practically all of the major plans of reorganization were worked out by the Commission in the year 1940 or prior thereto. Hence they do not and cannot reflect the extensive strengthening of cash resources, the important retirement of debt, and the very considerable improvements to road and equipment made possible by the huge revenues received during the ensuing war years.

It must be remembered further, that since the Milwaukee and Western Pacific decisions of the U. S. Supreme Court, undoubtedly most District Courts throughout the land, and certainly this Court, have been firmly convinced of their legal incapacity to pass upon matters of valuation

or allocation of securities as set out in plans of reorganization certified to them by the Commission.

Likewise, the Commission sensing the need for changes as the war years went on were undoubtedly loath to ask the District Courts for the return of their plans, feeling that they had passed out of their jurisdiction unless returned to them by the Courts. In proof of this may this Court again advert to the Senate hearings mentioned before.

In his testimony Commissioner Mahaffie states (p. 515):

"The Commission has considered that after a plan has been certified by it to the court having jurisdiction, the question of whether conditions had so changed as to require its resubmission with a view to possible revision is one for the court. And that the Court's determination is wholly a matter of judicial discretion. Consequently the Commission has felt that it should not volunteer advice to the courts in that regard."

To this Chairman Wheeler replied (p. 515):

"While I can readily appreciate that the Commission might hesitate somewhat to ask the Court to return a plan some courts might possibly resent it, nevertheless I think I would have taken a chance on it if I had been in the position of the Commission.

"On the other hand you may have had a situation where the courts were reluctant to send a plan back to the Commission. * * * In the meantime some of these securities were wiped out of existence. I just don't believe that the Commission on the one hand or the courts on the other hand, when an injustice is being done, should stand upon the question of mere fear that they are perhaps going to offend each other."

Only a few days ago when Senate Bill 1253 was under debate Senator Wheeler stated:

"Let us consider the matter from the social standpoint. If we have another depression in this country we are bound to be faced with the same grave social problems. What do Senators believe the people of the country will think of Government agencies which permit the wiping out of $2,500,000,000 worth of railroad stock, a considerable portion of which was owned by working men and women, by widows and orphans, while at the same time bonds which had been selling as low as $2.50 rose to par or over, by reason of the fact that the guess made by the Interstate Commerce Commission resulted in wiping out the stocks? What are those who lost by reason of that guess going to think of that Government agency?

"Time and again on the floor of the Senate I have defended the Interstate Commerce Commission, but I say that the Commission should have said to the courts:

"'We are going to call back the plans affecting these railroads now in receivership, revamp them, make them conform to the facts and realities, and try to have the railroads operated for the benefit of those who own the roads.'

"But they did not do that. The result is that those who held the senior securities which they bought in some cases at as low as $2.50 now have bonds worth up to $80 or $90 or even $100."

Congressional Record—Senate, June 15th, 1946 (p. 7114).

I am in accord with the sentiments of Senator Wheeler. We must be realistic. In the face of possible injustice no one should stand on ceremony.

In the present case we have a plan that except for slight modifications was prepared by the Commission in 1940 and rests on studies of earnings, etc., going back to 1937 and even beyond.

Against that we find the Debtor today with cash, or equivalent of over $70,000,000.; with an R.F.C. loan aggregating, principal and interest, in excess of $18,000,000.00 paid in full; with the entire first mortgage of the Peoria Terminal Co., to all intents and purposes paid in full; with over 20% of the Choctaw & Memphis first mortgage retired; and with an amazing reduction, in the interim, of equipment debt. Three classes of creditors set up in the original Plan have disappeared—the banks, the R.F.C., and the Peoria Railway Terminal Co.

The above recital does not take into account the tremendous sums expended over the period on improvement of road and equipment, nor does it include the retirement of debt on jointly owned facilities such as the Joliet and Denver terminals.

Certain it is that if Congress and the Commission now feel that reorganization plans prepared prior to the war did not properly evaluate the financial benefits flowing from the revenues of the war years, then this present case merits further review and consideration.

The various bills presented in, and hearings held by Congress open up a new vista of hope for the junior creditors and stockholders of the bankrupt railroad corporations.

However, in holding out hope to the junior creditors and stockholders, this court, above all, would not have that hope illusory. The Commission cannot throw to the winds all consideration of future earnings, nor can it perform miracles. The war revenues are past, higher costs of labor and materials, and many other new problems beset railroad management. With the most optimistic approach by the Commission it would be vain for the junior creditors to expect to be made whole.

It would seem, with the sound background that exists,

this Court's trustees, by making use of available cash, together with the proceeds of a conservative loan to be approved by the Commission and this Court, should be able to pay, at equitable prices, the General Mortgage and all of the relatively small divisional first mortgages.

This would achieve for the First and Refunding Mortgage, the Secured Bondholders, and all junior security holders a greater strengthening of their position and a chance for all to share to a larger degree in the securities of the reorganized company. Such a program would be in line with the debt retirement by trustees so strongly urged by the Chairman of the Senate Committee and would have the undoubted cooperation of the Commission.

Accordingly, in view of the dissenting vote of two classes of creditors, and in further view of what has been here said, the plan is not confirmed.

Enter:

MICHAEL L. IGOE
United States District Judge

June 28, 1946

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CHARLES ELMORE
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 408

H. C. ORTON, D. C. WOLF, J. B. JOHNSTON, KARL A. MEYER AND RUCKLER PENN, AS A PROTECTIVE COMMITTEE FOR THE HOLDERS OF PREFERRED STOCK OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR,

Petitioners,

vs.

GROUP OF INSTITUTIONAL INVESTORS, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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September 5, 1946.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 406.

H. C. ORTON, D. C. WOLF, J. B. JOHNSTON, KARL A. MEYER AND RUCKLER PENN, AS A PROTECTIVE COMMITTEE FOR THE HOLDERS OF PREFERRED STOCK OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR,

Petitioners,

vs.

GROUP OF INSTITUTIONAL INVESTORS, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Petitioners seek to review an order (R. 122) of the United States Circuit Court of Appeals for the Seventh Circuit, entered May 17, 1946, dismissing an appeal from an order of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered on January 3, 1946, (R. 98) in the Reorganization Proceedings, under Section 77 of the Bankruptcy Act, of Chicago, Milwaukee,

St. Paul and Pacific Railroad Company, Debtor. The decision of the Circuit Court of Appeals sought to be reviewed is reported at 155 Fed. (2nd) 489.

The order of the District Court from which the original appeal was taken was one denying the motion (R. 55) of Petitioners to modify the so-called Consummation Order (R. 7), entered November 26, 1945, which, among other things, vested the Debtor's property in the Reorganized Company. The motion did not raise objection to anything contained in the order of November 26, 1945, but sought to modify it by adding a paragraph numbered 49 reading as follows:—

> "(49) The Court further reserves jurisdiction over the property vested in the Reorganized Company by this order, over the Reorganized Company, over the Trustees, and over all other parties to this proceeding, for the purpose of entering an appropriate order, upon application being made by any party in interest, to apply to the Debtor and its property the provisions of any legislation hereafter becoming law which by its terms would have affected the Debtor had not this order been entered."

At the hearing on the motion Counsel for Petitioners stated that they would limit their motion to a request for the retention of jurisdiction only until the termination of the Seventy-ninth Congress of the United States. (R. 67.) To the motion was attached a copy of the so-called Reed Bill, H. R. 4779, introduced November 23, 1945, which provided that if the properties of a railroad corporation in a reorganization proceeding pending under Section 77 should have produced average annual earnings during the period of the preceding seven calendar years sufficient to pay the fixed charges of said Debtor in said years and the judge should so find, he should direct the Trustees to return the properties to the corporation and allow a period of eighteen

months within which to negotiate with creditors for reorganization of the property and, if such negotiations were not successful within the time provided, the 77 proceeding should be resumed.

Petitioners constitute a Protective Committee for the holders of the old preferred stock of Chicago, Milwaukee, St. Paul and Pacific Railroad Company prior to its reorganization, which stock was found to be of no value by the Interstate Commerce Commission, the District Court having jurisdiction of the Bankruptcy Proceedings and the Circuit Court of Appeals for the Seventh Circuit. Such finding was approved by this Court in—

> *Group of Institutional Investors, et al.* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* 318 U. S. 523, 541.

A comprehensive chronology of the Milwaukee Proceedings is set forth in a footnote to the decision of the Circuit Court of Appeals in 155 Fed. (2nd) 489. We shall, therefore, refer here only to certain of the more important steps taken in said proceedings.

The first plan of reorganization was set forth in an order of the Interstate Commerce Commission of February 12, 1940 (239 I. C. C. 485). That plan was approved by the District Court on October 21, 1940, the Court's decision being reported at 36 Fed. Supp. 193. On appeal that plan was approved in part and reversed in part by the Circuit Court of Appeals of the Seventh Circuit on December 4, 1941, the decision appearing at 124 Fed. (2nd) 754. This Court granted certiorari to review the judgment of the Circuit Court of Appeals and on March 15, 1943, rendered its decision reported at 318 U. S. 523, in which it approved the plan except as to two points, one involving the priority of liens on certain pieces of lines and the other involving the question of additional compensation to senior bondholders, neither of which questions is material here.

The proceeding went back to the Interstate Commerce Commission which, after a hearing, on December 6, 1943, promulgated a modified plan which was further modified by its order of April 10, 1944, reported at 254 I. C. C. 707, and 257 I. C. C. 223. At the hearing before the Commission the earnings of the Company from the date of the original plan up to and including the year 1943, which was the peak year of the carrier so far as net railway operating income was concerned, were introduced in evidence and appear in Exhibits 224 and 231 before the Commission which exhibits constitute a portion of the unprinted record. This plan, with certain clarifications and corrections made pursuant to Section 77, was approved by the District Court on June 30, 1944, 58 Fed. Supp. 384. The plan so approved was the final plan. Appeals from the order approving the plan were dismissed by the Circuit Court of Appeals of the Seventh Circuit on October 31, 1944 (145 Fed. (2nd) 299) and certiorari was denied by this Court (324 U. S. 857—Rehearing denied 325 U. S. 895).

This plan was submitted to and accepted by the requisite percentage of creditors to whom submission was necessary. In both plans the Commission found and the Courts approved the finding that the stock of the Debtor, both preferred and common, was of no value and the old stockholders, therefore, were not given any participation under the plan. After approval by the creditors, the Court, after hearing pursuant to notice given, entered an order confirming the plan on February 23, 1945. (R. 1.) From that order no appeal was taken. A Reorganization Committee to carry out the plan, whose members were nominated as provided in the plan, was approved by the District Court by order dated March 13, 1945, and proceeded with its work.

The plan provided for the payment of cash to certain bondholders in excess of $52,000,000. This payment was

made beginning June 1, 1945, pursuant to an order of Court of May 22, 1945. Thereafter, the Interstate Commerce Commission approved the acquisition of the Debtor's property by the Reorganized Company, approved the use for reorganization purposes of the old corporation with certain amendments to its charter as set out in the Charter Amendments Order, which is by stipulation a part of this record, and approved the issuance of the new securities. (C. M. St. P. & P. R. R. Co. Reorganization, Finance Docket No. 10882, Order dated November 15, 1945.)

On November 26, 1945, after notice to all parties, including the Petitioners, and following hearing, the District Court entered the Consummation Order (R. 7) which was in effect a final order vesting the property of the Debtor in the Reorganized Company, approving various instruments necessary to consummate the reorganization and directing the consummation. No appeal was taken from that order. The date of the vesting of the property of the Debtor in the Reorganized Company, as fixed in said order, was December 1, 1945.

No objection was made to the Consummation Order or to the Charter Amendment Order, entered on the same date, which approved the charter amendments and directed that they be filed with the Secretary of State of the State of Wisconsin, the State of incorporation. Paragraph (14) of the Consummation Order (R. 31) provides that the shares of stock of all classes and the certificates representing all such shares of stock of the Debtor are "declared to be void and of no effect and are cancelled for all purposes whatsoever." The order also directed that the transfer to the Reorganized Company should be free of all claims of the stockholders of the Debtor as provided in the confirmed plan of reorganization. The Charter Amendment Order provided that all shares of the old stock were cancelled and

nullified, the equities of the holders thereof having been found to be of no value, and that the new stocks should be issued according to the plan. The Consummation Order directed that the old mortgages be released of record, the new mortgages executed and delivered and placed of record and that the new securities issued by the Reorganized Company be irrevocably delivered to the Exchange Agent for transmittal to those entitled thereto under the confirmed plan of reorganization. All of these directions were carried out. The property of the Debtor was transferred to the Reorganized Company on December 1, 1945, and certified copies of the Consummation Order, pursuant to Section 77 (k), the Trustees' Deed, the releases of the old mortgages and the new mortgages were recorded in two hundred and thirteen places in the fourteen States in which the Company operates. Irrevocable delivery of the new securities to the Exchange Agent was made and said Agent began delivery to those entitled under the plan early in December. The new securities were listed for trading both in New York and in Chicago and it is a matter of common knowledge that there has been heavy trading continuously ever since. Testimony as to the action taken in consummation of the plan appears in the printed record, pages 81 to 88, inclusive.

At the hearing upon the motion, on January 3, 1946, the Petitioners relied upon the recital in the motion that average earnings of the Debtor from 1938 to 1944, inclusive, were in excess of the average fixed charges and the further recital of an increase in the assets of the Debtor between December 31, 1937, and January 1, 1944, and the change in economic conditions generally, and urged that the assets of the Company were sufficient to provide an equity for the old preferred stockholders though they conceded that there was $85,000,000 of debt ahead of the stock which was not compensated under the plan. They insisted that they were not seeking any change in the plan and, upon being

questioned by the Court, stated that they did not contend that they had any rights under the present law; that their rights had been wiped out and that they could not say to the Court that he should change the plan. (R. 62, 66, 67, 91.)

The Trustees and the Reorganization Committee introduced evidence showing the financial condition of the Debtor on different dates, including December 31, 1943, the effective date of the plan being January 1, 1944. This financial information is contained in Exhibits 1 and 2, found at pages 97 and 98 of the printed record. Exhibit 2 shows that the assets of the Company, as of October 31, 1945, were less than on December 31, 1943. Exhibit 1 shows that on December 31, 1943, there was unpaid interest on bonds other than Adjustment Bonds of $77,864,098, Funded Debt matured and unpaid amounting to $17,390,463, and Adjustment Bond interest unpaid amounting to $125,268,480, which Adjustment interest had increased, on October 31, 1945, as shown by Exhibit 2, to $142,031,902. All of the above items were ahead of preferred stockholders. (See 318 U. S. 523, at 530 and 573.)

Exhibit 2 also shows that the items of cash and temporary cash investments, as of December 31, 1943, amounted to $120,113,614, which items, on October 31, 1945, amounted to the reduced total of $92,577,063.

At the hearing it was pointed out by the Vice President and Comptroller of the Company that the claim of the Adjustment Bondholders, in the aggregate amount of $77,721,320 (R. 73) received no compensation whatsoever under the plan, and that the remainder of the claim, amounting to $230,420,853 (R. 74) was compensated in common stock which, at the market on the day the stock was made available for distribution, was worth only $64,440,058, so that the distribution to these bondholders, who were secured

creditors, fell short by $243,702,115 of making full compensation to them. In addition, general unsecured creditors were only fractionally compensated. (R. 75.)

The Circuit Court of Appeals dismissed the appeal, upon the grounds that the order appealed from was not appealable and also because it appeared from the facts discussed in the opinion that no other conclusion could be justified than the one reached by the District Court and that no abuse of discretion could be ascribed to the Court, which reasons were set forth in the motions to dismiss as characterizing the appeal as frivolous.

Petitioners point out that the so-called Wheeler-Reed Bill, S. 1253, embodies certain provisions of the Reed Bill, referred to in Petitioners' original motion, and certain provisions of the original Senate Bill, S. 1253, introduced by Senator Wheeler on July 12, 1945, and later amended to affect reorganization railroads. This Wheeler-Reed Bill was embodied in a Conference Report which was adopted by both Houses but the President declined to approve the legislation so that it did not become law. The Seventy-ninth Congress has adjourned *sine die*. In substance, Petitioners' request is that this Court should require the District Court to amend the Consummation Order retroactively in the hope that a Special Session may be held in 1946 which might enact legislation which they contend would apply but which we are convinced could not apply to these proceedings.

Final Decree in the Bankruptcy Proceedings was entered on June 18, 1946, and a copy thereof is attached, as an appendix, to the brief filed herein on behalf of the Reorganization Committee.

SUMMARY OF ARGUMENT.

I. The Order of the District Court refusing to modify the Consummation Order was not appealable.

Triangle Electric Co. v. *Foutch*, 40 Fed. (2nd) 353.

Re Pechin, 227 Fed. 853.

In re Witthoft, 98 Fed. (2nd) 972.

In re Gelino's, Inc., 51 Fed. (2nd) 875.

Pfister v. *Northern Illinois Finance Corp.*, 317 U. S. 144.

Wayne Gas Co. v. *Owens Co.*, 300 U. S. 131.

Old Colony Trust Co. v. *Kurn*, 138 Fed. (2nd) 394.

Ross v. *Commissioner of Internal Revenue*, 316 U. S. 685.

Wisconsin v. *Illinois*, 281 U. S. 179, 197-8.

In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 145 Fed. (2nd) 299.

Sancho v. *Acevedo*, 93 Fed. (2nd) 331; (C. C. A. 1) Certiorari denied 303 U. S. 662.

Pearson v. *Higgins*, 34 Fed. (2nd) 27.

II. The Order of Confirmation, entered February 23, 1945, was a final adjudication of the rights of the stockholders. No appeal was taken therefrom and thereafter the stockholders had no interest in the proceeding.

Sub. (f) of Section 77, Bankruptcy Act; Title 11, Sec. 205, U.S.C.A.

Chicago & North Western Railway Company v. *United States*, 52 Fed. Supp. 65, affirmed 320 U. S. 718.

6 Am. Juris, para. 593, p. 867.

In re Chicago & North Western Railway Company, 121 Fed. (2nd) 791.

In re Michigan Ohio Building Corp., 117 Fed. (2nd) 191.

Missouri Pacific R. Co. v. *Thompson*, 134 Fed. (2nd) 139, 141; (C. C. A. 8) Certiorari denied 320 U. S. 806.

United States v. *Peerless Weighing & Vending Machine Corporation*, 96 Fed. (2nd) 996; 97 Fed. (2nd) 1019; (C. C. A. 2) Certiorari denied 305 U. S. 633.

III. The Court could not, by reservation of jurisdiction, change the confirmed plan.

In re Corona Radio & Television Corporation, 102 Fed. (2nd) 959.

In re Diversey Building Corporation, 141 Fed. (2nd) 65.

In re Flatbush Av.-Nevins St. Corp., 133 Fed. (2nd) 761.

North American Car Corp. v. *Peerless Weighing & Vending Machine Corporation*, 143 Fed. (2nd) 938, 941.

Towers Hotel Corp. v. *LaFayette National Bank, etc.*, 148 Fed. (2nd) 145.

IV. After confirmation and consummation, rights became vested which could not be disturbed by Congressional action and the Court was right in refusing to attempt to give retroactive effect to hoped-for legislation.

Cooley, Constitutional Limitations, 8th Edition, Vol. 1, pages 190, 191, 192.

McCullough v. *Virginia*, 172 U. S. 102.

Steamship Company v. *Joliffe*, 2 Wallace 450, 457.

Pritchard v. *Norton*, 106 U. S. 124.

Hoyt Metal Co. v. *Atwood*, 289 Fed. 453.

Coombes v. *Getz*, 285 U. S. 434.

Ocoha v. *Hernandez*, 230 U. S. 139.

Union Joint Stock Land Bank v. *Byerly*, 310 U. S. 1.

In re Corona Radio & Television Corp., 102 Fed. (2nd) 959 (C. C. A. 7—1939).

In re Wedgewood Hotel Company, 125 Fed. (2nd) 327 (C. C. A. 7—1942).

V. There is no equity in the position of Petitioners.

Group of Institutional Investors v. *CMStP&PRR Co.*, 318 U. S. 523.

Reconstruction Finance Corporation v. *D&RGW RRCo.*, 150 Fed. (2nd) 28. Reversed 90 L. Ed. 1134.

ARGUMENT.

I.

The Order of the District Court Refusing to Modify the Consummation Order Was Not Appealable.

We agree that the appeal section of the Bankruptcy Act is applicable in 77 proceedings and, while this section (24) permits appeals in proceedings in bankruptcy, either interlocutory or final, the construction of the section, both before and after the most recent amendments in 1938, requires that orders in bankruptcy, to be appealable, must have a certain degree of finality. The reason for the rule was stated in—

Triangle Electric Co. v. *Foutch*, 40 Fed. (2nd) 353.

The Court in that case quoted with approval from the earlier case of *Re Pechin*, 227 Fed. 853, the following:

> "There must be a certain degree of finality about these administrative orders before they can be reviewed; if every order were reviewable, proceedings could easily be so tied up and prolonged that the situation would become intolerable. * * *"

The same rule was applied by the Circuit Court of Appeals of the Seventh Circuit in—

In re Whitthoft, 98 Fed. (2nd) 972,

and in the earlier case of—

In re Gelino's, Inc., 51 Fed. (2nd) 875.

The rule has been most frequently applied to orders denying rehearings. A leading case decided by this Court is—

Pfister v. *Northern Illinois Finance Corp.*, 317 U. S. 144,

in which the Court has this to say with reference to the refusal to modify a prior order:

> "A refusal to modify the original order, however, requires the appeal to be from the original order, even though the time is counted from the later order refusing to modify the original. An appeal does not lie from the denial of a petition for rehearing. *Conboy* v. *First National Bank*, 203 U. S. 141, 145; *Bowman* v. *Loperena*, 311 U. S. 262, 266; *Brockett* v. *Brockett*, 2 How. 238; *Roemer* v. *Bernheim*, 132 U. S. 103; *Jones* v. *Thompson*, 128 Fed. (2nd) 888; *Missouri* v. *Todd*, 122 Fed. (2nd) 804."

One of the best known cases upon the general subject is—

Wayne Gas Co. v. *Owens Co.*, 300 U. S. 131.

The specific question of the appealability of an order refusing to modify a prior order or decree has been decided in a case arising under Section 77 of the Bankruptcy Act.

Old Colony Trust Co. v. *Kurn*, 138 Fed. (2nd) 394 (C. C. A. 8—1943).

In that case the Court made an order on October 14, 1942, directing the Trustees of the Debtor Railway Company to pay over an amount represented by certain bonds with interest at the rate of 5%. Thereafter a motion was made to modify the order by changing the interest rate to 6%. The motion was denied by order of December 8, 1942, from which latter order the appeal was taken. No appeal was taken from the order of October 14, 1942. The Court dismissed the appeal saying, at page 395:

> "The appellee challenges the jurisdiction of this court to entertain this appeal on the ground that it was not taken from an appealable order. This challenge, we think, must be sustained. 'Motions to vacate orders, motions for rehearings or for new trials, and like motions are addressed to the discretion of the trial court and are intended to call its attention to

errors allegedly committed by it and to afford an opportunity for their correction. Orders granting or denying such motions are not appealable.' *Jones* v. *Thompson, et al.*, 8 Cir., 128 F. 2d 888, 889; *United States* v. *East*, 8 Cir., 80 F. 2d 134, 135; *United States* v. *Dowell*, 8 Cir., 82 F. 2d 3, 4; *Missouri* v. *Todd*, 8 Cir., 122 F. 2nd, 804; *Wayne United Gas Co.* v. *Owens-Illinois Glass Co., et al.*, 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed., 557; *Pfister* v. *Northern Illinois Finance Corporation*, 317 U. S. 144, 149, 63 S. Ct. 133, 87 L. Ed. 146. *A motion to modify a judgment falls into the same category as a motion to vacate or for a rehearing. That this court is without jurisdiction of an appeal from an order dismissing a motion to modify a judgment is too well settled to require discussion.* (Italics ours.)

The appellant seeks to sustain its right of appeal by the contention that the order of October 14, 1942, because of the court's reservation of jurisdiction was not a final order and hence not appealable. The question of the finality of the order of October 14, 1942, is of no importance to decision here, since no appeal lies from the denial of a motion to modify a non-appealable order. *Republic Supply Co. of California* v. *Richfield Oil Co. of California*, 9 Cir., 74 F. 2d 909, 910. Moreover, if by this argument appellant means to say that the order of October 14, 1942, only became final upon the denial of the motion to modify, appellant has nevertheless failed to appeal from the order after it became final; and, whether the time for appeal began to run on October 14, 1942, the date of the original entry of the order, or on December 18, 1942, the date of the denial of the motion to modify, the time for appeal has expired. 11 U.S.C.A. Para. 48.

The appeal is dismissed for want of jurisdiction."

The *Kurn case* is on all fours with this case and there is sound reason supporting the rule announced. If a party were permitted to make a motion to modify an order in some one particular and then to take an appeal from

the order denying the modification, such motions could be repeated from day to day, each referring to some different particular in which modification might be desired and by that process appeals could be multiplied and the proceeding indefinitely prolonged, whereas, in fact, what the moving party is attacking all along is the order which he seeks to modify. If that order contains something which the party thinks it should not contain or does not contain something which he thinks it should contain, as was the case here, then his objection in either case goes to the order which represents in final form the Court's action. In this case such final order was the Consummation Order entered on November 26, 1945. By appeal from such order, assuming the proper foundation were laid, the appealing party could review all of the alleged defects upon which he relies. In this case no appeal was taken from that order, either before or after the denial of the motion to modify, and the time to appeal has long since expired. That order was entered pursuant to notice which definitely stated that it was proposed to vest the property of the Debtor and of the Trustees in the Reorganized Company. These Petitioners, though having such notice, did not object to the order as entered and as to them the same has become final.

Petitioners argue that the decision that this order was not appealable is in conflict with the decision in—

U. S. v. *Trogler*, 237 Fed. 181,

decided by the Circuit Court of Appeals of the Eighth Circuit in 1916. The distinction between the cases is apparent at a glance. In the *Trogler case*, as pointed out in the opinion, the Court was asked to give effect to an agreement made between the parties to a decree subsequent to its entry, which agreement was in the form of a stipulation for the entry of a supplemental decree in conformity with its terms. The District Court refused to

enter the decree asked for by the parties and the Circuit Court of Appeals, in reversing the case, said, at page 184:—

> "We think the trial court was wrong. It was not asked to modify the former decree upon a re-examination of the issues that were involved in the suit in which the decree was entered. Its action was invoked to give effect to an agreement made between the parties to the decree subsequent to its entry. Clearly parties are at liberty to enter into agreements in respect to their rights under judgments of courts, the same as in regard to any other property right. And if the aid of the court is necessary in order to carry out their agreement, we see no reason why a court should not give them such relief."

The case of—

United States v. *Rizzo,* 297 U. S. 530,

likewise relied upon by the Petitioners, is equally inapplicable. In that case, while the petition of the United States for rehearing, after an adverse decree denying its complaint for forfeiture of a vessel engaged in carrying alcohol, allegedly in violation of the Custom Laws, was pending, the Court permitted the sale of the alcohol and the United States then filed a petition asking that the proceeds be paid into the Treasury in satisfaction of the lien for taxes due on the alcohol. This Court quite properly held that the rights sought to be enforced by the United States had not theretofore been litigated and that the order denying the Government's petition was appealable.

Petitioners try to avoid the *Kurn case* by stating that it was in fact a denial of a petition for rehearing, a contention which is clearly negatived by the decision which makes it clear that the matter involved was a motion to modify a prior order.

There is no merit to the contention that the proposed

new legislation constituted new matter and presented a new issue not involved at the time the Consummation Order was entered. Legislation certainly is not effective until it is enacted, and, as we understand it, the Courts apply the law as it is at the time they are called upon to act. The introduction of a Bill constituted no valid ground for interfering with this and other reorganization proceedings. If the Bill had in fact been enacted, then the question of its application to this proceeding would require a consideration of the provisions of the legislation and the status of the proceedings at the time of its enactment. The Court was not called upon to make a guess as to the probable outcome of the proposed legislation and if it could it was not called upon to suspend or delay the proceedings in anticipation of what might or might not happen. As a matter of fact, the proposed legislation in this case never became a law and Congress has adjourned.

This Court has rejected attempts to hold up the conclusion of litigation until after Congressional action on proposed legislation. In—

Ross v. *Commissioner of Internal Revenue,* 316 U. S. 685,

a petition for certiorari was filed in this Court to review a decision of the Circuit Court of Appeals for the Third Circuit, reported in 125 Fed. (2nd) 767. The petitioner also filed a motion to defer consideration of the petition pending action upon said proposed legislation. The Solicitor General opposed the motion stating that it was entirely conjectural as to whether or in what form Congress would enact any such legislation and whether it would in any event be applicable to the case. This Court denied the motion to defer consideration and likewise denied the petition for certiorari. (316 U. S. 685.)

The only case relied upon by Petitioners to justify the

retention of jurisdiction in anticipation of Congressional action is—

Wisconsin v. *Illinois,* 281 U. S. 179, 197-8,

but the case does not support their position. In fact it is an authority directly against them. The case involved the withdrawal of water from Lake Michigan and by a prior decree the restoration of rights adjudged to the complainants was made gradual and the case referred to a Master to consider the appropriate measures. The situation was a continuing one and naturally subject to Congressional action. With reference to that subject the Court says:—

> "These requirements as between the parties are the constitutional right of those States, subject to whatever modification they hereafter may be subjected to by Congress acting within its authority. It will be time enough to consider the scope of that authority when it is exercised. In present conditions there is no invasion of it by the former decision of this Court, as urged by the defendants. The right of the complainants to a decree is not affected by the possibility that Congress may take some action in the matter. See *Southern Utilities Co.* v. *Palatka,* 268 U. S. 232, 233. *Kansas* v. *Colorado,* 206 U. S. 46, 117."

Before leaving this point we cannot refrain from referring to the statement of the Petitioners that the introduction of the proposed legislation was unknown to them and to the Court at the time the Consummation Order of November 26, 1945, was entered. The fact is that the introduction of the Bill by Congressman Reed was widely publicized in the papers of November 23rd and 24th and prior to that time wide publicity was likewise given in the Chicago papers to the effect that Congressman Reed, of Illinois, had requested the Court to postpone action in the Milwaukee proceeding and the Court, at the time he directed

entry of the order of November 26, 1945, stated from the Bench that he had heard from members of Congress and others urging that the proceedings be not closed and that the properties be placed back in the hands of the stockholders. Under the circumstances, if Petitioners were in ignorance of what was going on, they evidently were the only ones interested in this reorganization who were in that condition.

Moreover, they certainly knew of the efforts which were being made in Congress over a long period to amend Section 77 of the Bankruptcy Act for the purpose of preserving stockholder interest in reorganizations. The Hobbs Bill, H. R. 4960, was introduced in 1944 in the Seventy-eighth Congress and a similar Bill with the same general objective, H. R. 37, was introduced in January, 1945, and passed the House on February 14, 1945, which was prior to the date of confirmation of the plan in the Milwaukee case. It was referred to the Senate Committee on Interstate Commerce and remained there throughout the time that this plan was being consummated. The fact is that the pendency of legislation of this character was brought to the Court's attention in the petition for certiorari to review an appeal from an order dismissing the appeals from the approval of the plan of reorganization, *In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* 145 Fed. (2nd) 299, which petition for certiorari was denied by this Court (324 U. S. 857) rehearing denied (325 U. S. 895).

Petitioners urge that alleged lack of merit of the appeal was no ground for its dismissal. We have pointed out above that the Court based its decision upon the points that the order appealed from was not appealable, that there was no abuse of discretion and that the appeal under the facts was frivolous. The order was not appealable under the doctrine of the *Kurn case, supra;* if discretionary, it

A three-judge court, in the case of—

Chicago & North Western Railway Company v. *United States*, 52 Fed. Supp. 65, affirmed 320 U. S. 718,

in construing the sub-division just quoted, says:—

"After an order of the Commission has been approved by the bankruptcy court, submitted to vote of creditors and subsequently confirmed by the district court sitting as a court of bankruptcy, the order is no longer merely an order of the Commission, but has the character of a valid, judicial decree of the bankruptcy court. Section 77, sub. f, 11 U. S. C. A. Sec. 205 sub. f, which states that the provisions of the plan and of the order of confirmation shall be binding 'subject to the right of judicial review,' clearly intends that the 'judicial review' shall be by the circuit court of appeals and thence to the Supreme Court, not to a three-judge district court. The prescribed procedure was followed in this case, and now, having failed in its attempts to win judicial support for its contentions in the designated forums, plaintiff seeks reconsideration of its arguments by a still further procedure which is not open to it."

See 6 Am. Juris., Para. 593, p. 867.

These statutory provisions under Section 77 are somewhat different from those under 77B and its successor, Chapter X of the Bankruptcy Act. In 77B and Chapter X proceedings the Court has power to modify a plan of reorganization after its confirmation (11 U.S.C.A. 207 (f); Chapter X, Sec. 222; 11 U.S.C.A. 622) and the final decree specifically terminates the interests of the stockholders. (Sec. 228; 11 U.S.C.A. 628.) In Section 77 proceedings, on the other hand, the Court has no power to modify a plan of reorganization after its confirmation and express provision is made for review of the order of confirmation, after which the plan is final and binding upon all parties.

Even in 77B and Chapter X proceedings, the modification which would have been required to give participation to stockholders would not have been proper in spite of these statutory differences.

In re Diversey Building Corporation, 141 Fed. (2nd) 65.

The order confirmed a plan which by its terms excluded all stockholders of the debtor from any participation. This exclusion had been approved by the District Court, the Circuit Court of Appeals and by this Court and the denial of stockholders of any rights was, therefore, finally determined when the plan was confirmed. The only way that holders of old preferred stock could ever obtain any participation in the assets of the debtor would be by setting aside or changing the plan of reorganization since the plan disposes of all of the assets of the debtor and under those circumstances the old preferred stockholders could not obtain anything except what was taken away from someone else.

Since the plan, after confirmation without appeal, became final, the stockholders from that time forward had no interest whatever in the estate and no right to participate further in these proceedings. The Circuit Court of Appeals, in—

In re Chicago & North Western Railway Company, 121 Fed. (2nd) 791.

considered this question and in the course of its opinion said:—

> "A court should hesitate before denying to the parties whose rights are thus cut off, the right to review its order by appeal. On the other hand, the court must give heed to the fact, that where the debtor's property is insufficient to pay the debts and obligations of the debtor, the stockholder *has no interest* in the debtor's

estate. His interest is nil. He is as much a stranger as if he had never held the stock." (p. 799; italics in the original.)

The same conclusion was reached in a case arising in a 77B proceeding, the decision being by the same court, in—

In re Michigan Ohio Building Corp., 117 Fed. (2nd) 191.

See to the same effect—

Missouri Pacific R. Co. v. *Thompson*, 134 Fed. (2nd) 139, 141; (C. C. A. 8) Certiorari denied 320 U. S. 806;

United States v. *Peerless Weighing & Vending Machine Corporation*, 96 Fed. (2nd) 996; 97 Fed. (2nd) 1019; (C. C. A. 2) certiorari denied 305 U. S. 633.

It would seem, therefore, that after the confirmation of the plan and expiration of time to appeal, the stockholders of the debtor ceased to have any property interest which could be restored, either by judicial decree or by a legislative act. In this case the proceedings went further and were in fact consummated even before the motion of the Petitioners was made and certainly as a result vested rights were created which could not later be disturbed. This latter question will be more fully developed in a later point.

III.

The Court Could Not, by Reservation of Jurisdiction, Change the Confirmed Plan.

We have previously pointed out that in order to grant preferred stockholders any participation it was necessary to change or amend at some time the plan of reorganization. This is obvious and is not denied by Counsel for

Petitioners. The Wheeler-Reed Bill provided specifically for the amendment of plans to provide for excluded classes in the case of carriers to which the Act applied. We have likewise shown under the preceding point that the decree of confirmation is a final judgment which definitely fixes the plan of reorganization. As heretofore stated, Section 77 contains no provision for changing a plan after it is confirmed or for any supplemental or amended plan after the order of confirmation. True, the plan is thereafter subject to timely judicial review, but there was no such judicial review in this case.

It is submitted that the Court could not, by means of reservation of jurisdiction in the order of confirmation, and certainly not by a similar reservation in the order of consummation, make possible any subsequent change in the plan. Our view upon this point is supported by the following decisions:—

In re Corona Radio & Television Corporation, 102 Fed. (2nd) 959;

In re Diversey Building Corporation, 141 Fed. (2nd) 65;

In re Flatbush Av.-Nevins St. Corp., 133 Fed. (2nd) 761;

North American Car Corp. v. *Peerless Weighing & Vending Machine Corporation,* 143 Fed. (2nd) 938, at p. 941;

Towers Hotel Corp. v. *LaFayette National Bank, etc.,* 148 Fed. (2nd) 145.

These cases arose in 77B and Chapter X proceedings where the applicable statutes, as pointed out under II above, gave the court power to modify a plan after confirmation, (11 U.S.C.A. 207 (f); Sec. 222, Chap. X, 11 U.S.C.A. 622) whereas no such power is given by Section 77.

In the *Diversey* case the Court said:

> "We interpret subsection f to mean that changes and modifications after the plan is confirmed refer to such changes as will better aid in carrying out the plan which has been finally confirmed, and not such changes or modifications as will materially alter the property rights established by the decree of confirmation, and in no event shall any change be made without the consent of the court."

In the *Corona case* the Court, in discussing the effect of reservation of jurisdiction, said:—

> "As heretofore stated, we do not think there was any reservation in the plan by which jurisdiction was retained, and we are also of the opinion that no general reservation contained in a plan could be utilized by the court so as to confer jurisdiction, after a final decree of a matter inconsistent with the plan itself. To so hold would be the equivalent of altering the plan and the contract included therein, without the consent or approval of the debtor, creditors, or parties to the contract."

In the *Flatbush case* we find this language:

> "Congress did not intend that the Bankruptcy Court should, after an approval of a plan under Chapter X, Bankr. Act, 11 U. S. C. A. Sec. 501 *et seq.*, have power to remain a wet-nurse to the reorganized company. A bankruptcy court cannot obtain that power merely by inserting a provision reserving jurisdiction."

In the *Peerless case* we find the following:—

> "Nor is it an answer to such delay, to the prejudice of other parties in interest, to say that they should have taken steps to procure a final closing order from the court. True, there seems no reason why such order should not have been entered long before; but, after all, that tends to be only a formality and to be so considered by the parties, as was obviously the case here. It is the confirmation and consummation of the plan

which is the culminating point of the entire proceedings; and it is unnatural, as well as inequitable, to deny finality to a fully consummated plan until the court chooses to write 'finis' in some formal legal language for the clerk to copy into the court records. Indeed, there seems considerable point in appellants' claim that the order below was a substantial modification of the plan by changing the time limit for exchange after it had already passed, and hence was improper for lack of the notice required by sub. f quoted above."

We also call attention to the following statement by the Court in the *Towers Hotel case:*

> "Judge Galston's interpretation of the powers reserved in his decree seems reasonable both under the rule of *ejusdem generis* and under the reasoning of our recent decisions in which we held that in confirming a plan of reorganization the court may only retain jurisdiction in order to protect its decree, to prevent interference with the execution of the plan and to aid otherwise in its operation, and may not, through the device of retaining jurisdiction, keep a debtor in tutelage and burden the court with future supervision of the reorganized estate." Citing cases.

If the Court could not, pursuant to reservation of jurisdiction in the Confirmation Order, change the plan, it necessarily follows that a similar reservation in the Consummation Order would be ineffective since the Consummation Order after all is an order designed to execute the provisions of the confirmed plan and carry it out in accordance with its terms.

We note that Petitioners argue that the recent action taken by Judge Igoe in the Rock Island case is inconsistent with and contrary to his action in the Milwaukee proceeding. We do not follow this argument. In the first place, the mere fact that the same judge presided in both cases and that the dates of the two rulings were reasonably close together would of itself, we think, indicate quite

clearly that in the opinion of the judge rendering the decision there was no inconsistency as indeed there was not. In the Rock Island case the Court was considering the question of whether or not it should confirm the plan of reorganization which had been submitted to creditors and had been rejected by the vote of two of the classes of such creditors to whom such submission was made and the Court was faced with the question whether or not he should find that the rejection by these creditors was not reasonably justified. This question, of course, turned upon the particular facts applicable in that case. The important distinction is that the Court was there considering *confirmation* and not the reservation of jurisdiction after *confirmation*.

IV.

After Confirmation and Consummation, Rights Became Vested Which Could Not Be Disturbed by Congressional Action and the Court Was Right in Refusing to Attempt to Give Retroactive Effect to Hoped-for Legislation.

The plan in this case was not only confirmed without objection and without appeal but has been fully consummated, the old securities cancelled, the old mortgages released and the new securities delivered. Moreover, there has been trading in these securities over a period of many months. Certainly it cannot be said that the rights of those who have obtained the new securities are not vested.

It is elementary that legislation may not be enacted which has the effect of destroying or adversely affecting vested rights. Any such legislation by States is prohibited by the Fourteenth Amendment and similar legislation by Congress is a violation of the Fifth Amendment. This rule applies to property rights as well as rights acquired by contract, judgment or otherwise. Judge Cooley, in his

work on Constitutional Limitations, 8th Edition, Volume 1, pages 190, 191 and 192, states the general rule as follows:

> " 'But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the court.
>
> " 'As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law which the legislature permits to remain in force. "To declare what the law is, *or has been* is a judicial power; to declare what the law *shall be* is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial."
>
> " 'If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry.' "

This rule as applied to judgments is found in *McCullough* v. *Virginia*, 172 U. S. 102. At page 123 the rule is thus stated:

> "It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the

legislature to disturb the rights created thereby ceases."

One of the earliest cases establishing the rule is—

Steamship Company v. *Joliffe*, 2 Wallace 450, 457.

The Court in that case says:

"When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

The following statement is found in—

Pritchard v. *Norton*, 106 U. S. 124:

"Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice. Cooley, Const. Lim. 362-369."

See also—

Hoyt Metal Co. v. *Atwood*, 289 Fed. 453.
Coombes v. *Getz*, 285 U. S. 434.
Ocoha v. *Hernandez*, 230 U. S. 139.
Union Joint Stock Land Bank v. *Byerly*, 310 U. S. 1.

Applying the principle illustrated by these cases, it would seem to be clear that any legislation which Congress might enact which would take away anything from those who were entitled to participate under the plan and to

whom distribution has been made, or which would materially affect their rights, would violate the Fifth Amendment and would, therefore, be invalid as applied to this reorganization.

As a matter of fact, if the so-called Wheeler-Reed Bill had been enacted, we think it is perfectly clear that it would not by its terms apply to this proceeding. The property is no longer in the custody of the Court but has long since been transferred to the Reorganized Company, and the Court has no jurisdiction of the proceeding except for the very limited purpose set forth in the Final Decree which was entered on June 18, 1946, and is attached as Appendix A to the brief of the Reorganization Committee. Section 2 (15) of the proposed Bill was restricted to the case of a carrier under the jurisdiction of the United States Courts on the effective date of the Act. This obviously meant general jurisdiction and not the limited and restricted jurisdiction over procedural matters which was retained by the District Court. That view is supported by the following cases:

In re Corona Radio & Television Corp., 102 Fed. (2nd) 959 (C. C. A. 7—1939).

In re Wedgewood Hotel Company, 125 Fed. (2nd) 327 (C. C. A. 7—1942).

Whatever might have been the application of the statute is not for consideration here. The legislation was not enacted and at the moment none is pending. We are at a loss to understand the suggestion made by Petitioners that the District Court took hasty action in these proceedings when as a matter of fact the consummation of the plan of reorganization continued from the time of confirmation, in February, 1945, to December 1, 1945.

The Court has not, as suggested by Petitioners, stood in the way of any legislation or legislative action but has ap-

plied the law as it was and as it is. Petitioners, on the other hand, asked this Court to adopt a standby policy which would in effect suspend all reorganization plans in the hope that Congress might give them something to which they are not entitled under existing law. We believe we have pointed out that any such future legislation could not affect this proceeding, but in any case such a course would be a new departure in judicial procedure.

V.

There Is No Equity in the Position of Petitioners.

The question of whether or not the plan of reorganization was fair and equitable in this proceeding has been given full consideration and the plan, so far as the rights of the stockholders are concerned, has had the approval of this Court.

Group of Institutional Investors v. *C.M.St.P.&P. R.R.Co.*, 318 U. S. 523, 541.

At the hearing on the motion of Petitioners for a modification of the Consummation Order reliance was placed upon the general improvement in economic conditions and improved earnings of the carrier during the war period. The fact is, however, that the present plan was not approved by the District Court until June 30, 1944, and by that time the peak earnings, so far as net income was concerned of this carrier, had passed. At the time of the hearings before the Interstate Commerce Commission upon the final plan, the earnings for the year 1943 were introduced in evidence in Exhibits No. 224 and No. 231. There were appeals to the Circuit Court of Appeals from the order approving the plan and great reliance was placed upon the war time earnings. At the time of the argument on the appeal in the Circuit Court of Appeals, the earnings for the year 1943, and 1944 as well, were brought to the atten-

tion of the Court, and in dismissing the appeals, the Court said:

"We are of the view that the District Court properly refused to refer the proceeding to the Commission for the purpose of considering further a valuation theretofore determined and approved by the Supreme Court. Conceivably a situation might arise in a proceeding of this character wherein a party might be entitled to be heard on account of a changed condition, but in view of what the Supreme Court has said in this and other cases, we think clearly that no such situation is presented. Furthermore, the debtor seeks to circumvent the test of increased net earnings which the Supreme Court has prescribed and relies upon the alleged increased value of assets and the decreased amount of liabilities. In this connection, it is pertinent to observe that a memorandum taken from the record was handed to the court during oral argument, which discloses debtor's revenue and expenses for the years 1943 and 1944. While there was an increase in the amount of operating revenue in 1944 over the same period in 1943, there was a marked decrease in the net income for 1944, due to the greatly increased cost of operation. This situation is corroborative of the Supreme Court's prophetic discussion (pages 543-544 of 318 U. S.) as to what is likely to happen in a normal year."

* * * * *

"We are of the opinion that the appeals should be dismissed. In reaching this conclusion, we are not unmindful that parties are ordinarily entitled to have their cases reviewed on the merits. We are not presented, however, with an ordinary situation; in fact, it is extraordinary. The proceeding has been pending for more than nine years. As the Supreme Court in the instant case said (page 545 of 318 U. S.), 'We cannot conclude that in this proceeding, * * * the interests of junior claimants have been sacrificed for speed.' We are satisfied, as has so often been emphasized, that the public interest requires that there be no further delay. We think the motion to dismiss should be allowed on the

ground that the modified Plan conforms to the opinion and mandate of the Supreme Court, in which event there is nothing to review." *In Re C. M. St. P. & P. R. R. Co.*, 145 Fed. (2nd) 299, 304.

This Court said, with reference to war earnings (318 U. S. 543):

> "As we have noted, the Commission conceived as its responsibility the devising of a plan which would serve 'as a basis for the company's financial structure for the indefinite future.' We cannot assume that the figures of war earnings could serve as a reliable criterion for that 'indefinite future'."

It is clear, therefore, that any improvement in earnings during the war period was before the Commission and the Court for consideration before the plan was finally approved. The earnings record since confirmation has still further emphasized the correctness of the Commission's original conclusion. It will be noted that under the plan approximately $20,000,000 are required annually to service the plan through the preferred stock. The recent published report of this carrier covering the first six months of 1946 shows net income for that period, after deducting interest and other charges provided in the plan, as a deficit amounting to more than $3,500,000, and for the last two months of said period the earnings were not sufficient to pay operating costs. Exhibit 2 (R. 98) shows a reduction in total assets since the effective date of the plan. While it is true, as shown by the same exhibit, that on October 31, 1945, there were cash and temporary cash investments amounting to approximately $92,500,000, there were over against that item $46,635,916 of fixed interest in default and $142,031,902 of Adjustment Mortgage Bond interest unpaid and cumulative in character. If the plan were entirely set aside and the property turned back to the debtor under the old capitalization, it would immediately be the duty of the corporation

to pay out, as far as the cash items would go, these items of interest, and available current assets, as shown by the Exhibit, would fall far short of making the payments. In addition, the showing of current assets on October 31, 1945, did not take into consideration necessary expenditures which have since been made in order to service the plan from its effective date forward, namely: the payment of interest on fixed and income bonds since January 1, 1944, the effective date of the plan, and compliance with the provisions in the plan for capital funds and sinking funds. In addition, a dividend has been declared and paid on the new preferred stock, payable out of earnings for the year 1944, as authorized by the plan. This item required the expenditure of approximately $5,600,000. A like additional amount would be required if the full preferred dividend should be declared payable out of earnings for 1945. There are other items to be met out of current assets, and a reasonable amount for working capital must be available at all times, which amount is approximately $12,000,000. Such items were shown in Exhibit 231.

Before the Circuit Court of Appeals great reliance was also placed upon the cash which had accumulated during the war period while interest on the outstanding obligations was not being paid, and in support of their position Counsel confidently cited the case of—

Reconstructon Finance Corporation v. *D. & R. G. W. R. R. Co., et al.*, 150 Fed. (2nd) 28,

which had reversed decisions of the District Court approving and confirming the plan of reorganization for the carrier there involved. One of the grounds for the reversal was the accumulation of cash which the Circuit Court felt justified more liberal treatment of certain bondholders. Unfortunately for Petitioners' argument, however, that case was reviewed by this Court and reversed by the decision of June 10, 1946. (90 L. Ed. 1134.)

In discussing the matter of accumulated cash, this Court pointed out in the *Denver & Rio Grande decision, supra,* that the creditors who received common stock to make them whole obtained with that common stock an interest in all cash on hand or all cash that might be accumulated which cash would be reflected in the value of the common stock, and that any gain or any loss after the effective date of the plan "was a benefit or an injury to the new common stockholders and then sometimes to security holders in positions senior to them." So here, any cash available, not required to service the plan, would increase the value of the stock and, to the extent not required to maintain and operate the property, would properly go to the new stockholders who represent former bondholders who fell far short of receiving full compensation under the provisions of the plan.

Reference has already been made in the Statement of the Case to the fact that over $77,000,000 of bond interest was not compensated at all and secured claims in a total amount of $230,000,000 were compensated only to the extent of less than one-third. (R. 74.)

We mention these facts because the Petitioners apparently assume that the old preferred stockholders have been unjustly treated and that rights of some value have been forfeited, whereas exactly the contrary is the fact. The Commission was unable to find the wherewithal to fully compensate the bondholders and general creditors in this proceeding and subsequent events confirm rather than impeach the conclusion reached by the Commission and approved by the Courts that the stock was of no value.

Conclusion.

We feel that this petition is prosecuted by those who no longer have any interest in these proceedings and who heretofore have been precluded from participation by the order of confirmation; that they are attempting to review an order dismissing an appeal from an order which was not appealable and that there is no basis in law or in equity for granting their extraordinary request that the Bankruptcy Court be required to modify, with retroactive effect, and in utter disregard of vested rights acquired under a plan fully consummated, an order which has been completely carried out, for the sole reason that the Petitioners hope that at some future time they may secure the enactment of legislation, not now pending, which, if enacted, might in some way operate to their advantage.

We, therefore, respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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M. L. Bluhm,
Attorneys for Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Respondents,
888 Union Station,
Chicago 6, Illinois.

Chicago, Sept. 5, 1946.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 408

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Debtor.

H. C. ORTON, D. C. WOLF, J. B. JOHNSTON, KARL A. MEYER and RUCKER PENN, as a Protective Committee for the Holders of Preferred Stock of CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, Debtor,

Petitioners,

vs.

GROUP OF INSTITUTIONAL INVESTORS, et al.,

Respondents.

BRIEF OF REORGANIZATION COMMITTEE IN OPPOSITION TO PETITION FOR CERTIORARI

KENNETH F. BURGESS,
FRED N. OLIVER,
Attorneys for Reorganization Committee.

SIDLEY, AUSTIN, BURGESS & HARPER,
OLIVER & DONNALLY,
Of Counsel.
Chicago, Illinois, September 5, 1946.

THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 408

H. C. ORTON, D. C. WOLF, J. B. JOHNSTON, KARL A. MEYER and RUCKER PENN, as a Protective Committee for the Holders of Preferred Stock of CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, Debtor,

Petitioners,

vs.

GROUP OF INSTITUTIONAL INVESTORS, et al.,

Respondents.

BRIEF OF REORGANIZATION COMMITTEE IN OPPOSITION TO PETITION FOR CERTIORARI

This brief is filed on behalf of the Reorganization Committee under the Plan of Reorganization of Chicago, Milwaukee, St. Paul and Pacific Railroad Company in opposition to the Petition for Certiorari filed by a Protective Committee for the Holders of Preferred Stock. The Protective Committee's petition seeks review of a judgment of the Circuit Court of Appeals for the Seventh Circuit, dated May 17, 1946, which dismissed an appeal from an order entered January 3, 1946, by the District Court for the Northern District of Illinois, Eastern Division.

The order of the District Court from which the appeal was taken denied the motion of the Protective Committee to modify the previously entered Consummation Order by adding to the reservation of limited jurisdiction contained therein provisions over which the Court no longer had jurisdiction, namely to change the executed Plan and the securities issued thereunder.

The Reorganization Committee which presents this brief was designated and approved pursuant to the Plan in March, 1945. This Committee, and also the Trustees in Bankruptcy, were discharged and released of all further duties by the Final Decree entered pursuant to Section 77(f) on June 18, 1946, except to participate in any appeals from or proceedings to review orders of the District Court. A copy of the Final Decree is attached to this brief as Appendix A.

The Plan of Reorganization herein has been approved, accepted, confirmed and consummated. The Consummation Order (from which no appeal was taken) was entered by the District Court on November 26, 1945. Under it and the related Charter Amendment Order (unprinted record), entered on the same day, which likewise has not been the subject of any appeal, the Reorganization Committee and the Trustees were directed to file charter amendments with the Secretary of State of Wisconsin cancelling and nullifying the old stock, to release the old mortgages of record, execute new mortgages, issue and distribute the new securities of the Reorganized Company, and on December 1, 1945, to effectuate a transfer of the property of the Debtor by the Trustees in Bankruptcy to the Reorganized Company. These orders were carried out, the property being transferred on December 1, 1945, and certified copies of the Consummation Order, the Trustees' deed, the mortgage releases and the new mortgages recorded in 213 counties in fourteen different states (Rec. 81). An irrevocable

delivery of the new securities to an exchange agent was likewise made at that time, and the exchange agent began transmitting them to those entitled thereto under the Plan early in December (Rec. 86).

It was not until twenty-four days after the Debtor's property had thus been conveyed by the Trustees in Bankruptcy to the Reorganized Company, in consummation of the Plan of Reorganization and in conformity with orders of the District Court, that a motion was presented by a group of preferred stockholders, asking the District Court to modify its Consummation Order. The modification initially requested was the addition of a clause to enlarge the original reservation of jurisdiction of the District Court so as "to apply to the Debtor and its property the provisions of any legislation hereafter becoming law which by its terms would have affected the Debtor had not this order been entered." This request was later changed, as stated in the petition to this Court (page 2), so as to seek modification of the Consummation Order "by retaining jurisdiction over the Debtor's property until the termination of the Seventy-Ninth Congress." The District Court, after hearing, denied the motion. The Protective Committee appealed therefrom, and motions to dismiss the appeal were made by the Reorganization Committee and by the Bankruptcy Trustees. The Circuit Court of Appeals deferred action on the motions to dismiss, and set the matter for argument on both the motions to dismiss and the merits of the appeal. After briefs were filed and oral arguments heard, the Circuit Court of Appeals, on May 17, 1946, rendered an opinion and judgment, dismissing the appeal on the grounds that the District Court had not abused its discretion, and that the order was not appealable.

Since the decision of the Circuit Court of Appeals, the Seventy-Ninth Congress, on August 2, 1946, by Concurrent

Resolution 165, adjourned *sine die.* (Congressional Record, August 2, 1946, p. 10883 as to Senate, and pp. 10920-21 as to House of Representatives.) While in session, the Seventy-Ninth Congress effectuated no change in the law regarding railroad bankruptcies. The President of the United States withheld his approval to Senate Bill 1253, commonly known as the Wheeler-Reed Bill, which had been passed by both houses in the closing days of the Session, with the result that it did not become law. In so doing, the President issued a statement (Appendix C, pp. 56-58, Petitioners' Brief herein) wherein he expressed a belief that "the next Congress" could pass a Bill which would meet his stated objections. He did not, however, express any intention of convening a special session of the Seventy-Ninth Congress, which he alone could do under the Constitution (Article 2, Section 3).

I.

CIRCUIT COURT OF APPEALS CORRECTLY DISMISSED THE APPEAL FROM THE ORDER OF THE DISTRICT COURT.

The Circuit Court of Appeals correctly held (a) that the District Court had not abused its discretion in denying Petitioners' motion, and (b) that the order sought to be reviewed was not appealable.

(a) DISTRICT COURT DID NOT ABUSE ITS DISCRETION.

The District Court refused to disturb the Consummation Order upon the petition for modification presented several weeks after the order had been fully carried out. Vested rights had been created in complete derogation of Petitioners' claim as representing old preferred stock, which stock had repeatedly been adjudged to be wholly without value.

On June 30, 1944, the District Court by order approved the Plan as it had been certified to it by the Interstate Commerce Commission (58 F. Sup. 384), after the Plan had been brought into conformity with the mandate of the Supreme Court (318 U. S. 523). This order was appealed by the Debtor and other parties, which appeals were dismissed by the Circuit Court of Appeals on October 31, 1944 (145 F. 2d 299). On March 13, 1945, the Supreme Court denied the petition for certiorari (324 U. S. 857), and on June 11, 1945, denied the petition for rehearing (325 U. S. 895). Meanwhile, all classes of creditors to whom the Plan had been submitted for a vote accepted it by percentages ranging from 87.88 to 100 per cent, the result being certified to the District Court by the Interstate Commerce Commission, which had conducted the vote. Thereupon the District Court, by order entered February 23, 1945, confirmed the Plan. No appeals were taken from this Order of Confirmation. The effect of the Order of Confirmation was specifically defined by statute as binding upon all parties, subject only to the right of judicial review (Subsection (f) of Section 77, 11 U. S. C. A. 205 (f)). The old stocks already had been determined to be without value at least twice each by the Interstate Commerce Commission and all of the courts, District Court, Circuit Court of Appeals and Supreme Court of the United States. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company Reorganization,* 239 I.C.C. 485, 571, 240 I.C.C. 257, 298, 254 I.C.C. 707, 257 I.C.C. 223, 260; *In re Chicago, M., St. P. & P. R. Co.,* 36 F. Supp. 193, 58 F. Supp. 384, 389; 124 F. 2d 754, 767, 131 F. 2d 214, 145 F. 2d 299; 318 U.S. 523, 541, 324 U.S. 857, 325 U.S. 895.

Both the Consummation Order and the Final Decree contained only limited reservations of jurisdiction in the

District Court.* These definite limitations upon reservation of jurisdiction extending only to purely administrative matters were in conformity with decisions of this Court and the various Circuit Courts of Appeal. *Wynkoop Co.* v. *Gaines,* 227 U. S. 4, 8 (1913); *In re Diversey Building Corp.,* 141 F. 2d 65 (C. C. A. 7, 1944); *In re Wedgewood Hotel Co.,* 125 F. 2d 327 (C. C. A. 7, 1942); *In re Utilities Power & Light Corporation,* 125 F. 2d 343 (C. C. A. 7, 1942); *North American Car Corp.* v. *Peerless Weighing & Vending Machine Corporation,* 143 F. 2d 938 (C. C. A. 2, 1944); *Reese* v. *Beacon Hotel Corp.,* 149 F. 2d 610 (C. C. A. 2, 1945).

Petitioners' contention that provisions to revive participation by the old stockholders would be procedural only and justified because of the interlocutory character of orders of the bankruptcy courts, is contrary to repeated

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*Paragraph 48 of the Consummation Order dated November 26, 1945, provided as follows: "The Court hereby reserves jurisdiction for all purposes necessary to put into effect and carry out this order and the Plan of Reorganization and any other orders entered by this Court relative thereto, including, without limiting the generality of the foregoing, giving instructions and directions to the Trustees of the Debtor's property with respect to matters now pending or matters which may hereafter arise and passing upon the final statement of account of said Trustees, making allowances of fees or compensation for services heretofore or hereafter rendered and reimbursement of expenses heretofore or hereafter incurred in connection with these proceedings or the Plan, receiving and passing upon a report or reports by the Reorganization Committee on the expenses incurred by them in carrying out and putting into effect the Plan of Reorganization, receiving a report or reports by the Reorganization Committee of the action taken by them under the Plan and the orders of this Court to consummate the Plan, and taking any and all other action necessary to terminate these proceedings." (Rec. 54).

Section 7 of the Final Decree dated June 18, 1946 (Appendix A this brief, p. 17) provided: "The Court hereby reserves jurisdiction to take such further proceedings as may be necessary or proper (a) because of any review of the order of this Court dated January 3, 1946 denying the motion of the Protective Committee for the Holders of Preferred Stock of the Debtor, or (b) in connection with any claims for allowances of compensation for services or reimbursement of expenses."

judicial decisions. *Wayne Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 137 (1937); *Union Land Bank* v. *Byerly*, 310 U. S. 1 (1940); *Coombes* v. *Getz*, 285 U. S. 434 (1932); *In re Chicago, M. St. P. & P. R. Co.*, 138 F. 2d 235 (C. C. A. 7, 1943); cert. den. 321 U. S. 770. Even if the Wheeler-Reed Bill had become law, its Section 2 (15), contrary to the assertion of Petitioners at page 7 of their petition herein, would not have been applicable to this case. That section is restricted, to-wit: "In the case of any carrier which is under the jurisdiction of the United States courts on the effective date of this Act, * * * ". This refers to a general jurisdiction and not to the limited and restricted jurisdiction over procedural matters which was retained by the District Court in its Consummation Order and Final Decree herein. *In re Argyle-Lake Shore Corp.*, 98 F. 2d 372 (C. C. A. 7, 1938); *In re Corona Radio & Television Corporation*, 102 F. 2d 959 (C. C. A. 7, 1939); *In re Wedgewood Hotel Co.*, 125 F. 2d 327 (C. C. A. 7, 1942); 11 U. S. C. A. 205 (a) and (f). Clearly the District Court acted within a reasonable and proper exercise of its discretion in denying Petitioners' motion to modify the already executed Consummation Order.

(b) ORDER OF DISTRICT COURT NOT APPEALABLE.

The appeal in this case is restricted to an appeal from a denial of Petitioners' motion to modify the Consummation Order of November 26, 1945. No appeal was taken from the Consummation Order itself. The Circuit Court of Appeals correctly held that an order denying such a motion to modify was not appealable. In *Pfister* v. *Finance Corp.*, 317 U.S. 144 (1942), this Court affirmed a decision of the Circuit Court of Appeals for the Second Circuit, holding that such an appeal as was taken here will not lie. This Court said, at page 149:

> "A refusal to modify the original order, however, requires the appeal to be from the original order, even though the time is counted from the later order re-

fusing to modify the original. An appeal does not lie from the denial of a petition for rehearing. *Conboy* v. *First National Bank,* 203 U.S. 141, 145; *Bowman* v. *Loperena,* 311 U.S. 262, 266; *Brockett* v. *Brockett,* 2 How. 238; *Roemer* v. *Bernheim,* 132 U.S. 103; *Jones* v. *Thompson,* 128 F.2d 888; *Missouri v. Todd,* 122 F.2d 804."

The cases which are cited by the Petitioners in their effort to distinguish the present case from the rule thus stated are wholly inapposite.

II.

DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT.

The Plan of Reorganization of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, which had been confirmed and consummated prior to the filing of Petitioners' motion to modify, conformed strictly to the opinions and judgments of this Court. *Group of Investors* v. *Milwaukee R. Co.,* 318 U.S. 523 (1943); *Ecker* v. *Western Pacific R. Corp.,* 318 U.S. 448 (1943); *Chicago & N. W. Ry. Co.* v. *Bank Committee,* 318 U.S. 793 (1943); *Akron, C. & Y. Ry. Co.* v. *Hagenbuch,* 318 U.S. 794 (1943); *Park* v. *Group of Investors,* 324 U.S. 857, 325 U.S. 895 (1945); *R.F.C.* v. *Denver & R.G.W.R. Co.,* ... U.S. ..., 66 S. Ct. 1282 (1946); *St. Louis-San Francisco Railway Company* v. *Chase National Bank,* ... U.S. ..., 66 S. Ct. 1365 (1946). In view of this controlling fact, any conflict with the decision of another Circuit Court of Appeals would be without significance. However, there is no such conflict.

Petitioners contend that the decision below conflicts with a decision of the Circuit Court of Appeals for the Eighth Circuit, rendered thirty years ago in *United States* v. *Trogler,* 237 F. 181. An examination of the decision shows that it dealt wholly with its special facts, namely, giving effect to an agreement between the parties to the decree subsequent to its entry. Likewise, Petitioners con-

tend that the decision "is contrary to the principles announced and given effect to by this Court in *Wisconsin* v. *Illinois*, 281 U.S. 179." (Petition p. 9) That decision was but a step in long continued litigation involving the right of Illinois to withdraw water from Lake Michigan, and this Court rejected a contention that it should withhold a decree because of "the possibility that Congress may take some action in the matter." (p. 198)

This Court has heretofore rejected other attempts to hold up the conclusion of litigation until after Congressional action on proposed legislation. In *Ross* v. *Commissioner of Internal Revenue*, 316 U.S. 685 (1942), a petition for certiorari was filed with respect to a decision of the Circuit Court of Appeals for the Third Circuit, reported in 125 F.2d 767. The petitioner also filed a motion to defer consideration of the petition for certiorari pending action upon certain proposed legislation. The Solicitor General of the United States opposed the motion, stating in his brief in opposition to the petition for certiorari that:

> "Petitioner has filed a motion praying for the deferment of action upon the petition for certiorari pending Congressional action upon certain proposed legislation. At the present time it is entirely conjectural as to whether or in what form Congress will enact any such legislation, and whether it would in any event be applicable to the peculiar facts of this case."

This Court denied the motion to defer consideration and on the same day denied the petition for certiorari. (316 U.S. 685)

The bankruptcy proceedings herein which were terminated by the Consummation Order and the Final Decree were initiated more than eleven years ago (June 29, 1935). After extended administrative and judicial proceedings and extensive appellate review, including repeated resort to the Supreme Court, the railroad has been reor-

ganized and is being operated by the Reorganized Company with a new set of directors, officers and stockholders. The pendency of litigation, no matter how illy conceived, consititutes a deterrent to necessary financing in the interest of sound and economical operation. It has actually prevented the Reorganized Company from taking advantage of a favorable securities market to refund its underlying bonds at interest rates lower than now seem available. The pendency of such litigation also promotes stock market speculation in securities long ago stricken from the exchanges and revives ill-founded hopes in those whose old stock has repeatedly been determined to be without value that in some way they may still "get something out of the situation." It becomes the basis for continued solicitation of contributions from the holders of such worthless stock to finance further desperate attempts to carry on litigation.

We submit that in these circumstances there is no further basis in law or in equity for a recognition of such extraordinary relief as the Petitioners herein seek. This attempted review has been prosecuted by persons who no longer have any legal or equitable interest in the subject matter. *In re Michigan-Ohio Bldg. Corp.*, 117 F. 2d 191 (C.C.A. 7, 1941).

We pray that the petition for certiorari be denied.

Respectfully submitted,

KENNETH F. BURGESS,
FRED N. OLIVER,
Attorneys for
Reorganization Committee.

SIDLEY, AUSTIN, BURGESS & HARPER,
OLIVER & DONNALLY,
Of Counsel.

Chicago, Illinois, September 5, 1946.

Appendix A

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

In Proceedings for the Reorganization of a Railroad

In the Matter of CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, *Debtor*	No. 60463

FINAL DECREE

This cause coming on to be heard pursuant to the order entered herein on May 29, 1946 on the petition of the Reorganization Committee for a final decree, and it appearing to the Court that due notice of said order and of this hearing has been served and published as directed in said order, that Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of the Debtor's property, have filed herein a final statement of account, which has heretofore been approved by the Court, that the Reorganization Committee has filed herein a report of the action taken and the expenses incurred by it in the consummation of the Plan of Reorganization, that copies of said report and of the petition of the Reorganization Committee for a final decree have been served as directed in the aforesaid order entered May 29, 1946, and that no objections to said report have been made or filed, and the Court having examined said report, having heard the parties, and being fully advised in the premises, the Court therefore

FINDS AND CONCLUDES:

(A) All of the business and affairs of the Debtor, and all right, title, and interest of the Debtor and of the Trustees of the Debtor's property in and to the entire property of the Debtor of every kind and description, whether real, personal, or mixed, whether tangible or intangible, and whether of present or future interests, and all rights, privileges, and franchises of the Debtor, vested at 12:01 A. M., Central Standard Time, on December 1, 1945 (referred to in this decree as the Closing Time), in Chicago, Milwaukee, St. Paul and Pacific Railroad Company (referred to in this decree as the Reorganized Company), a corporation organized and existing under the laws of the State of Wisconsin, and then became the absolute property of the Reorganized Company, except as otherwise provided in the order vesting the Debtor's property in the Reorganized Company and authorizing and directing consummation of the Plan of Reorganization, entered herein on November 26, 1945 (referred to in this decree as the Consummation Order).

(B) Except as otherwise provided in the Consummation Order, the Reorganized Company and its property are free and clear of all rights, claims, interests, liens, and encumbrances of the creditors of the Debtor and of the holders of shares of capital stock of the Debtor, and except as otherwise provided in the Consummation Order the Debtor at the Closing Time was released and discharged forever from all of its debts and liabilities. The Reorganized Company has expressly assumed all obligations imposed upon it by the Plan of Reorganization and by the Consummation Order and all other orders entered by the Court in these proceedings containing provisions for the assumption of obligations by the Reorganized Company.

(C) The Plan of Reorganization for Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, which was confirmed by this Court by order entered Feb-

ruary 23, 1945, has been fully and properly put into effect in accordance with the terms thereof and of the documents heretofore approved by this Court, and pursuant to the authorizations and directions contained in the order entered herein on March 12, 1945, directing payment of the Reconstruction Finance Corporation loans, the order entered herein on May 22, 1945, directing a distribution of cash to the holders of certain bonds as provided in the Plan, the orders entered herein on April 16, 1945, June 13, 1945, and September 19, 1945, relating to the submission of certain provisions of the Plan to the Terre Haute bondholders and to the carrying out of those provisions, the Charter Amendment and Consummation Orders entered herein on November 26, 1945, and all other orders entered herein authorizing and directing action to be taken in consummation of the Plan as confirmed on February 23, 1945. All acts and things required by said orders and the Plan of Reorganization to be done or performed in order to consummate said Plan have been properly done or performed. As provided in said order of May 22, 1945 and the Consummation Order of November 26, 1945, all of the new securities and cash distributable under the Plan of Reorganization and said orders were deposited with or subject to the order of The First National Bank of Chicago, as the disbursing and exchange agent designated in said orders, for distribution to the persons entitled thereto, and said Bank and its New York agents have distributed approximately 97 per cent. of the cash authorized by the order of May 22, 1945 and have effected an exchange of approximately 88 per cent. of the principal amount of the securities and claims entitled to participate in the Plan (other than the Terre Haute bonds) and an exchange of approximately 94 per cent. of the principal amount of the Terre Haute bonds. Adequate and proper arrangements were made pursuant to said orders for the exchange and distribution of the remainder of the securities and cash.

(D) Pursuant to paragraph (4) of the Consummation Order, the final account of the Trustees of the Debtor's property, covering the period of their operation of the properties and business of the Debtor, from January 31, 1936 to December 1, 1945, has been filed in this Court, and the Court has approved said final account and released the surety on said Trustees' bonds from any and all liability on said bonds on account of any claim or cause of action arising in or in connection with these proceedings after the Closing Time. The said Trustees, Henry A. Scandrett, Walter J. Cummings, and George I. Haight, have faithfully discharged their duties and have well and truly accounted for all of the money and other assets and effects that have come into their hands as Trustees.

(E) William H. Mitchell, John D. Allen, James M. Barker, Elmer Rich, and Henry F. Tenney have faithfully performed their duties as members of the Reorganization Committee.

IT IS THEREFORE ORDERED AND DECREED:

1. The report of the Reorganization Committee on the action taken and the expenses incurred by it in consummating the Plan of Reorganization, which is attached as Exhibit A to the petition of the Reorganization Committee for a final decree, filed herein on May 29, 1946, is hereby in all respects approved.

2. The action of the Reorganization Committee, the Debtor, the Trustees of the Debtor's property, and the Reorganized Company, in putting into effect and carrying out the Plan of Reorganization and the orders of the Court in these proceedings, is hereby approved, ratified, and confirmed.

3. Henry A. Scandrett, Walter J. Cummings, and George I. Haight, as Trustees of the Debtor's property,

and William H. Mitchell, John D. Allen, James M. Barker, Elmer Rich, and Henry F. Tenney, as members of the Reorganization Committee, are hereby discharged and relieved of all further duties herein, except to appear and participate in any appeals from or proceedings to review orders of the Court herein.

4. All persons, firms, and corporations whatsoever, and wheresoever situated, located, or domiciled, are hereby perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute, or pursue, any suit, action, or proceeding, at law or in equity or otherwise, against Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Reorganized Company, or against the successors or assigns of the Reorganized Company, or against any of the assets or property of the Reorganized Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claim, judgment, or interest of any kind or nature in, to, or against the Debtor or any of its assets or properties, and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, personal, or mixed, of any kind or character, now or hereafter belonging to or being in the possession of the Reorganized Company, its successors and assigns, and from interfering with or taking steps to interfere with the Reorganized Company, its officers and agents, or the operation of the lines of railway and other properties or the conduct of the business of the Reorganized Company, by reason of or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's property, except the obligations imposed upon the Reorganized Company by the Consummation Order; and all such persons, firms, and corporations are also hereby restrained and enjoined from prosecuting

against the Reorganization Committee, or any of the members thereof, or against the Trustees of the Debtor's property, or any of them, or against the Reorganized Company, its successors and assigns, any suit, action, or proceeding arising out of or based on any act or acts done or omitted to be done in putting into effect and carrying out the Plan of Reorganization or any order of this Court entered in these proceedings.

5. The Reorganized Company is hereby directed to give notice of the entry of this final decree by mailing, postage prepaid, a copy thereof to the Trustees of the Debtor's property, the Reorganization Committee, the Secretary of the Treasury, each party of record in these proceedings and in the proceedings for the reorganization of the Debtor pending before the Interstate Commerce Commission (or the counsel for each such party), each trustee acting immediately prior to the Closing Time under a mortgage executed or assumed by the Debtor, each trustee now acting under a mortgage on property of Chicago, Terre Haute and Southeastern Railway Company, the trustees and other fiduciaries and agents now acting under the new mortgages and other instruments executed pursuant to the Consummation Order, the agencies which were acting for the Debtor immediately prior to the Closing Time in the consummation of the Plan of Reorganization of 1925 for Chicago, Milwaukee & St. Paul Railway Company (as listed in paragraph (N) of the Consummation Order), and to Chicago, Terre Haute and Southeastern Railway Company, The Bedford Belt Railway Company, and The Southern Indiana Railway Company.

6. The Reorganized Company shall also give notice of the entry of this final decree to all creditors and stockholders of the Debtor and all other parties in interest by causing a notice thereof, setting forth in said notice para-

graphs 1 to 8, inclusive, of this decree, promptly to be published once in each of the following newspapers:

> Boston Herald-Traveller; Wall Street Journal and Herald-Tribune, New York; Philadelphia Inquirer; Chicago Journal of Commerce and Chicago Daily News; Milwaukee Journal; Minneapolis Star-Journal; Seattle Post-Intelligencer; and Wall Street Journal (Pacific Coast Edition, San Francisco).

Proof of service by mail and of publication, as directed in paragraph 5 above and in this paragraph 6, shall be filed by the Reorganized Company with the Clerk of this Court within 30 days after the completion thereof.

7. The Court hereby reserves jurisdiction to take such further proceedings as may be necessary or proper (a) because of any review of the order of this Court dated January 3, 1946 denying the motion of the Protective Committee for the Holders of Preferred Stock of the Debtor, or (b) in connection with any claims for allowances of compensation for services or reimbursement of expenses.

8. Except as provided above, the proceedings in this Court entitled "In the Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor," No. 60463, are hereby terminated, and the case is closed.

ENTER:

MICHAEL L. IGOE
District Judge

Dated June 18, 1946